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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANICE R.,

Petitioner,

v.

DEBRA H.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the New York Court of Appeals acted in a manner that was arbitrary and fundamentally unfair, so as to violate the rights of Petitioner and those of the minor child under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the Full Faith and Credit Clause of Article IV, Section 1 of the U.S. Constitution, by applying Vermont law to resolve this case in which the only significant contacts were with New York?

Whether affording to a biological and adoptive stranger to Petitioner's child a parent-like role in the upbringing of the child violates the Petitioner's fundamental liberty right as a fit biological and natural parent, protected by the Due Process Clause of the Fourteenth Amendment, in the care, custody and control of her children, as recognized by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000)?

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1 (b), the parties here and in the Court of Appeals of New York are listed.

Petitioner here and appellee below is Janice R., a designation used to protect Petitioner's privacy. Respondent here and appellant below is Debra H., a designation used to protect Respondent's privacy.

RULE 29.6 DISCLOSURE STATEMENT

Both Petitioner and Respondent are natural persons. There are no parent corporations or corporations that hold 10% or more of the stock of any entity in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	ii
RULE 29.6 DISCLOSURE STATEMENT	iii
TABLES OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
A. This Court Should Grant The Petition Because This Case Raises A Critical Issue Regarding Choice of Law Due Process Claims.	2
B. This Case Raises A Critical Issue Regarding The Fundamental Liberty Interests Of Parents.	5

Table of Contents

	Page
STATEMENT OF THE CASE	
A. Proceedings In The Trial Court	7
B. Appeal To The New York Appellate Division, First Department	9
C. Proceedings In the New York Court of Appeals	9
D. Raising of Federal Question	12
REASONS FOR GRANTING THE PETITION	13
I. BECAUSE VERMONT'S CONTACT WITH THIS EXCLUSIVELY NEW YORK DISPUTE IS NOT SIGNIFICANT, THE NEW YORK COURT OF APPEALS' APPLICATION OF VERMONT LAW TO DETERMINE PARENTAGE VIOLATES THE PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.	13
II. THE DECISION OF THE NEW YORK COURT OF APPEALS INFRINGED ON THE CONSTITUTIONAL RIGHTS OF FIT NATURAL PARENTS RECOGNIZED BY THIS COURT IN *TROXEL V. GRANVILLE*, 530 U.S. 57 (2000).	27
CONCLUSION	30

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MAY 4, 2010 ..... 1a

APPENDIX B — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED APRIL 9, 2009 ..... 50a

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY DATED OCTOBER 2, 2008 ..... 53a

APPENDIX D — ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING MOTION FOR REARGUMENT DATED JULY 1, 2010 ..... 76a

TABLE OF CITED AUTHORITIES

Page

Cases

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) ..... *passim*

Anonymous v. Anonymous,
20 A.D.3d 333, 797 N.Y.S.2d 754 (1st Dep't), *appeal dismissed*, 6 N.Y.3d 740, 843 N.E.2d 1149, 810 N.Y.S.2d 409 (2005) 22

Baker v. State,
170 Vt. 194, 744 A.2d 864 (1999) 24

Bank v. White,
40 A.D.3d 790, 837 N.Y.S.2d 181
(2d Dep't 2007) 22

Behrens v. Rimberg,
32 A.D.3d 929, 822 N.Y.S.2d 285
(2d Dep't 2006) 22

Brady v. Dean,
173 Vt. 542, 790 A.2d 428 (2001) 24

Burgess v. Ash,
41 A.D.3d 473, 838 N.Y.S.2d 583
(2d Dep't 2007); 22

Burns v. Burns,
253 Ga. App. 600, 560 S.E.2d 47 (2002) 20

Cited Authorities

	Page
Cooney v. Osgood Machinery, Inc., 81 N.Y.2d 66, 595 N.Y.S.2d 919 (1993)	15
Debra H. v. Janice R., 14 N.Y.3d 676 (2010)	1
Debra v. Janice, 61 A.D.3d 460, 877 N.Y.S.2d 259 (1st Dep't 2009)	1, 9
Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003)	4
Godfrey v. Spano, 13 N.Y.3d	18
Hernandez v. Robles, 7 N.Y.3d	18
Home Ins. Co. v. Dick, 281 U.S. 397 (1930)	14
In re Adoption of Baby Boy S., 22 Kan. App. 2d 119, 912 P.2d 761 (1996)	16
In re Custody of Smith, 137 Wash.2d 1, 969 P.2d 21 (1998	28
In re K.M.H., 285 Kan. 53 (2007)	25
In re Marriage of Adams, 133 Ill.2d 437, 551 N.E.2d 635 (1990)	25

Cited Authorities

Page

John Hancock Mutual Life Ins. Co. v. Yates,
299 U.S. 178 (1936) 14

Langan v. St. Vincent Hospital,
196 Misc.2d 440 (Supreme Court 2003) 10

Langan v St. Vincent Hospital,
196 Misc.2d 440 (Supreme Court 2003) 17

Langan v. St. Vincent Hospital,
25 A.D.3d 90, 95, 802 N.Y.S.2d 476
(2d Dep't 2005) 11

Langan v. St. Vincent Hospital,
25 A.D.3d 90, 95, 802 N.Y.S.2d 476
(2d Dep't 2005) 18

Langan v. St. Vincent Hospital,
25 A.D.3d 90, 95, 802 N.Y.S.2d 476
(2d Dep't 2005) 22

Langan v. St. Vincent's Hosp. of NY,
25 A.D.3d 90, 802 N.Y.S.2d 475), (2nd Dep't 2005),
appeal dismissed, 6 N.Y.3d 890, 817 N.Y.S.2d
625 (2005) 19

Lynda A.H. v. Diane T.O.,
243 A.D.2d 24, 673 N.Y.S.2d 989
(4th Dep't 1998). 22

Matter of Alison D. v. Virginia M.,
77 N.Y.2d 651, 569 N.Y.S.2d 586, 572
N.E.2d 27 (1991) ..... *passim*

Page

Matter of C.M., 6 Misc. 3d 361, 365, 789 N.Y.S.2d 393 (N.Y. Co. 2004) 22

Matter of Jacob, 86 N.Y.2d 22

Meyer v. Nebraska, 262 U.S. 390 (1923) 5, 28

Miller-Jenkins v. Miller-Jenkins, 180 Vt. 441, 912 A.2d 951 (2006) ..... *passim*

Multari Jr. v. Sorrell, 287 A.D.2d 764, 731 N.Y.S.2d 238 (3d Dep't 2001) 22

Perry-Rogers v. Fasano, 276 A.D.2d 67, 715 N.Y.S.2d 19 (1st Dep't 2000) 22

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985) 3, 4, 5, 15

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 5, 28

Prince v. Massachusetts, 321 U.S. 158 (1944) 5, 28

Rosengarten v. Downes, 71 Conn. App. 372, 802 A.2d 170 (2002) 20, 21

Cited Authorities

Page

Santosky v. Kramer,
455 U.S. 745 (1982) 5, 27

Stanley v. Illinois,
405 U.S. 645 (1972) 5, 27-28

Stutsman v. Kaiser Foundation Health Plan,
546 A.2d 367 (D.C. 1988) 16

Troxel v. Granville,
530 U.S. 57 (2000) ..... *passim*

Statutes

14th Amendment of the United States
Constitution, § 1 1

28 U.S.C. § 1257 (a) 1

New York Domestic Relations Law, § 70 ... 1, 8, 9, 29

15 Vermont Statutes § 1204 ..... 2, 21

15 Vermont Statutes § 1206 18

Articles

Jackson,
Full Faith and Credit:
The Lawyer's Clause of the Constitution,
45 Colum. L. Rev. 1, 16 (1945) 3

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals is reported at 14 N.Y.3d 676 (May 4, 2010).

The opinion of the Appellate Division, First Department is reported at 61 A.D.3d 460 and at 877 N.Y.S.2d 259 (1st Dep't 2009).

JURISDICTION

The New York Court of Appeals entered the judgment sought to be reviewed on May 4, 2010. The denial of the Petitioner's Motion for Rehearing was entered on July 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14th Amendment of the United States Constitution, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law, § 70: (a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas

corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

15 Vermont Statutes § 1204 (d): The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

15 Vermont Statutes § 1204 (f): The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

INTRODUCTION

A. This Court Should Grant The Petition Because This Case Raises A Critical Issue Regarding Choice of Law Due Process Claims.

This case presents one of the most fundamental questions that can arise under our federal system when the interests of two or more states are at issue in

litigation: what choice of law does the Constitution require? As Justice Robert H. Jackson admitted, "it is difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine" this question. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 16 (1945).

Recognizing that choice of law can raise fundamental substantive due process interests, this Court articulated the applicable standard for choice of law due process claims in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312 (1981): "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, such that choice of its law is neither arbitrary nor fundamentally unfair." This very broad standard has given only limited guidance to lower courts confronted with the task of determining which state's law the court is constitutionally required to apply. Subsequently, this Court clarified this standard by teaching that when considering fairness in a choice-of-law due process claim, "an important element is the expectation of the parties." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 822, 837-38 (1985). This is because "the underlying theory of a choice-of-law due process claim must be that the parties plan their conduct and contractual relations based upon their legitimate expectations concerning the subsequent legal consequences of their actions." *Id.* at 837-38

Post-*Hague*, state and federal courts have rarely conducted close inquiries into the ingredients of choice-

of-law due process claims. While this Court has declared that *Hague* represented an abandonment of the "weighing-of-interest" approach that it had previously taken with respect to choice of law questions in the context of the Constitution's Full Faith and Credit Clause, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 489 (2003), courts have left largely unexamined, in the wake of *Hague*, the impact of courts' choice of law on litigants' substantive due process rights.

This case exemplifies the resulting confusion. Here, under the rubric of "comity," the New York Court of Appeals applied Vermont law to a set of facts that have only one incidental contact with Vermont and a preponderance of contacts with New York. Even while affirming the clear social policy of its own Legislature not to recognize the custody and visitation claims of biological and adoptive strangers to children, the New York Court of Appeals applied a foreign jurisdiction's law in a way that made a nullity of that policy, and thwarted the reasonable expectations of the New York-domiciled parties, in violation of the rule this Court announced in *Hague*. Indeed, the New York Court of Appeals did not apply the "reasonable expectations" test articulated in *Hague* and *Shutts*, and made clear that it did not even deem relevant evidence in the record that the parties considered the Vermont civil union to be without any legal force in New York.

This case illustrates that courts are overlooking the all-important substantive due process rights of litigants, and that they are ignoring the teaching of *Hague* and *Shutts*. The result is a diminution of the predictability of legal results in our federal system: litigants who live

in one state and have contact with only that state must fear that the radically different social policies of a state with only a single incidental contact to their lives may govern their relationship, instead of the law of the state where they have in fact chosen to live. Such is the situation in this case. This Court has not addressed the ingredients of choice of law due process claims since *Shutts* in 1985. It is now time to do so again in order to reinforce for both state and federal courts the critical importance of effectuating the reasonable expectations of parties when faced with choice of law issues.

B. This Case Raises A Critical Issue Regarding The Fundamental Liberty Interests Of Parents.

The Due Process Clause of the Fourteenth Amendment protects the rights of fit natural parents to direct and govern the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 69-70, (2000); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

In *Troxel v. Granville*, *supra*, 530 U.S. 57 (2000), the United States Supreme Court reasoned that the interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court" and concluded that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their

children." *Troxel*, 530 U.S. at 65-66, (some internal citations and quotations omitted).

Here, the New York Court of Appeals, while announcing a strong and unequivocal policy that its Legislature did not grant parental status to biological or adoptive strangers to children under New York's visitation statute, nonetheless granted the Respondent visitation rights under the statute of a foreign jurisdiction with only an incidental contact with the parties and the facts. Under New York law, the Respondent is not a "parent," and only Petitioner is a "parent." Moreover, Vermont's highest court, in construing the civil union statute, reviewed a range of factors including the expectations of the parties in reaching the conclusion that the civil union ex-partner who had no biological connection to the child was a "parent" for purposes of the Vermont statute. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951 (2006). The Court of Appeals did not consider whether any of these factors was present in the instant case. Consequently, even assuming the applicability of Vermont law, the granting of visitation rights to the Respondent as a "parent" was premature because no hearing had been held to inquire into the *Miller-Jenkins* factors, including the expectation of the parties. The New York Court of Appeal's ruling thus swept too broadly and violated the Petitioner's substantive due process rights as a fit natural parent.

The scope of the fundamental liberty interest identified in *Troxel* is implicated in this case, where a fit biological parent, such as the Petitioner, is confronted with a non-parent claiming parent-like status and

parental rights. Given the hodge-podge of inconsistent laws on parenthood evolving throughout the nation, clarification of the exact scope of this fundamental liberty interest is becoming a nationally important issue. This Court should grant this Petition in order to clarify the critical importance of the fundamental liberty interests identified in *Troxel* and its progeny.

STATEMENT OF THE CASE

A. Proceedings In The Trial Court

Petitioner Janice R. ("Petitioner") and respondent Debra H. ("Respondent") were both residents of New York State. They entered into a civil union in the Vermont in November 2003. At the time of the civil union, Petitioner was already eight (8) months pregnant with a child conceived through artificial insemination, which had taken place in New York. After entering into the civil union, the parties returned to New York City, where they lived until they separated. The child, M.R., was born in December 2003 in New York. Petitioner and Respondent separated in 2006, but Petitioner and Respondent continued to live separately in New York City. At no time had Respondent ever adopted M.R. After the separation, Petitioner allowed Respondent supervised visits with M.R. through May 2008, when Petitioner sought to end contact between Respondent and M.R.

In May 2008, Respondent commenced this proceeding on an order to show cause against Petitioner in the Supreme Court of New York, New York County, seeking among other relief joint legal and physical

custody of M.R. The court temporarily reinstated the visitation schedule and ordered a factual hearing on Respondent's application.

At the hearing on July 10, 2008, the parties acknowledged the New York Court of Appeals decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) giving visitation rights only to a child's biological or adoptive parent absent extraordinary circumstances. Respondent argued that the doctrine of equitable estoppel allowed her to seek visitation or custody notwithstanding *Alison D,* and argued that, based on *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 912 A.2d 951 (2006), the parties' Vermont civil union entitled her to seek visitation and custody rights. At the same hearing, Petitioner testified that she rebuffed Respondent's requests for a second-parent adoption. She argued that *Alison D.*, which interpreted Domestic Relations Law § 70, was still valid law, and that Petitioner conceived M.R. prior to entering into the civil union with Respondent in Vermont. In a decision and order filed on October 9, 2008, Supreme Court granted Respondent visitation based on equitable estoppel grounds, reasoning that the parties' civil union was "a significant, though not necessarily a determinative, factor in Respondent's estoppel argument" because, under Vermont law, "parties to a civil union are given the same benefits, protections and responsibilities . . . as are granted to those in a marriage," which "includes the assumption that the birth of a child during a couple's legal union is `extremely persuasive evidence of joint parentage.'"

The trial judge ordered an additional hearing to resolve whether Respondent had a parental relationship with M.R. Prior to this hearing, however, the Petitioner appealed to the Appellate Division, First Department, and obtained a stay of the trial court's order mandating hearings.

B. Appeal To The New York Appellate Division, First Department

Petitioner appealed to the New York Appellate Division, First Department, and obtained a stay of the equitable-estoppel hearing ordered by Supreme Court, pending disposition of the appeal. On April 9, 2009, the Appellate Division unanimously reversed, vacated the trial court's order and dismissed the proceeding. *Debra v. Janice,* 61 A.D.3d 460, 877 N.Y.S.2d 259 (1st Dep't 2009). The court determined that *Alison D.* was controlling, and held that "a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70." *Id.* at 461.

C. Proceedings In the New York Court of Appeals

On appeal, the Respondent argued on various grounds that *Alison D.* was outmoded and should be overruled. The New York Court of Appeals reaffirmed its holding in *Alison D.*, but reversed the Appellate Division's order on grounds of comity in light of Respondent's status as a "parent" under Vermont law. The Court of Appeals held that *Alison D.*, in conjunction with second-parent adoption, created a bright-line rule that promoted certainty and predictability of parental

identity, in contrast with the "limbo of doubt" that would ensue were courts to adopt the approach urged by the Respondent, and opined that any change in the meaning of "parent" under New York law should come as a result of legislative action rather than judicial fiat. However, the Court of Appeals then went on to hold that the Vermont civil union statute applied to this New York dispute, and that Respondent was a parent under that statute.

The Court of Appeals minimized testimony by the Petitioner that the civil union was of no consequence to her, and that based on her own legal research and the advice of counsel she had concluded that the civil union was of no legal force in New York, as indeed such unions are not in fact recognized in New York for any purposes.

The only reported New York case giving limited weight to Vermont civil unions at the time the parties entered into their civil union was *Langan v. St. Vincent Hospital*, 196 Misc.2d 440 (Supreme Court 2003). *Langan* was a wrongful death and medical malpractice case in which the court considered whether the plaintiff's status as a spouse of his same-sex partner in the Vermont civil union which provided all benefits of marriage under the laws of Vermont, entitled him to recognition as a "spouse" under New York's wrongful death statute. On the grounds of comity, the trial court in *Langan* answered this question in the affirmative, but expressly acknowledged that it was not deciding whether a Vermont civil union was a marriage for all purposes in New York, but only whether the plaintiff would be considered a "spouse" for purposes of the wrongful death statute. 196 Misc.2d at 444-45. Thus, the

trial court's decision in *Langan* had no applicability to the parties' situation. One basis for this holding was a finding that New York policy did not preclude recognition of a same-sex union in a sister state. *Id.* at 447. In 2005, the New York appellate court disagreed with this conclusion and reversed the *Langan* trial court finding that the doctrines of full faith and credit and comity did not apply, and also finding that New York had a strong public policy against recognition of same-sex marriage for purposes of the wrongful death statute. *Langan v. St. Vincent Hospital*, 25 A.D.3d 90, 95, 802 N.Y.S.2d 476 (2d Dep't 2005).

The Court of Appeals disregarded testimony as to the expectations of the Petitioner in entering into the civil union. Instead, the Court of Appeals found controlling the fact that the parties traveled to Vermont to enter into a civil union, and concluded that Respondent was a parent solely because of that choice. The Court of Appeals concluded, based on the doctrine of comity, that Vermont's policy of recognizing same-sex parentage within a civil union did not conflict with New York's policy, since New York allows that result in cases in which parties undertake a second-parent adoption, but ignored completely the fact that no second parent adoption had occurred or been permitted here. Thus, the Court of Appeals reversed the order of the Appellate Division, and ordered that the best-interest hearing proceed.

This Petition followed.

D. Raising Of Federal Question

Rule 14 (g) requires in relevant part that "[i]f review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e. g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The question of the extra-territorial applicability of Vermont law, in the context of the Respondent's equitable estoppel argument, was raised in the lower court and discussed in Justice Beeler's October 2, 2008 order in the New York Supreme Court, New York County. The question of giving the Vermont civil union force as a result of comity was raised by Respondent in the New York Court of Appeals and was relied on by that Court in its May 4, 2010 order and opinion.

The question of the scope of the Petitioner's rights under *Troxel v. Granville*, 530 U.S. 57, 69-70, (2000) was raised in the New York Court of Appeals and referred to in that Court's May 4, 2010 order and opinion.

REASONS FOR GRANTING THE PETITION

I. BECAUSE VERMONT'S CONTACT WITH THIS EXCLUSIVELY NEW YORK DISPUTE IS NOT SIGNIFICANT, THE NEW YORK COURT OF APPEALS' APPLICATION OF VERMONT LAW TO DETERMINE PARENTAGE VIOLATES THE PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

This Court has held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

Hague, which arose in Minnesota state court, involved a fatal motor vehicle accident in which the parties had contacts with Minnesota and Wisconsin. Identifying a conflict between the insurance law of Minnesota and Wisconsin material to resolution of the dispute, the Minnesota court applied Minnesota law. The victim was employed in Minnesota and commuted to Minnesota daily, the defendant did business in Minnesota, and the plaintiff, the decedent's spouse, became a Minnesota resident prior to the institution of the action. 449 U.S. at 313-19. The Supreme Court held these contacts were sufficient in the aggregate to satisfy due process. *Id.* at 320.

Reviewing the "weighing of contacts" tests traditionally used by the Court to assess the constitutionality of choice of law, the Court observed:

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.
>
> 449 U.S. at 308 (citations omitted).

As instructive examples of the earlier approach, the Court discussed *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). *Dick* and *Yates* were both inter-jurisdictional insurance disputes in which the forum state applied its own substantive law to interpret insurance policies despite the forum state's having an attenuated relationship to the facts and parties. In both cases, this Court invalidated the application of the forum state's substantive law on due process grounds.

The *Hague* court concluded that *Dick* and *Yates* stood for the proposition "that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Hague*, 449 U.S. at 310-11. In order to determine if a

contact is significant or not, the *Hague* plurality cautioned that courts must give particular weight to the reasonable expectations of the parties and the legitimate interest of the forum state in the controversy before it. *Hague, supra,* 449 U.S. at 318, n.24 (Stevens, J., concurring in judgment), and at 449 U.S. at 333 (per Powell, J., concurring in judgment).

Post-*Hague,* courts have continued to regard as critical the reasonable expectations of the parties when determining whether the application of a particular state's law is appropriate and passes constitutional muster. In *Phillips Petroleum Company v. Shutts,* 472 U.S. 797, 822 (1985), this Court reasoned that "[w]hen considering fairness in [the context of a constitutional claim], an important element is the expectation of the parties." This is because "the underlying theory of a choice-of-law due process claim must be that the parties plan their conduct and contractual relations based upon their legitimate expectations concerning the subsequent legal consequences of their actions." *Id.* at 837-38 (per Stevens, concurring in part and dissenting in part).

For this reason, state courts, including those of New York, have generally sought to protect the reasonable expectations of the parties when considering choice of law questions. *See, e.g., Cooney v. Osgood Machinery, Inc.,* 81 N.Y.2d 66, 77, 595 N.Y.S.2d 919 (1993) (citing *Hague,* in personal injury action against New York sales agent, New York Court of Appeals applied the substantive law of Missouri to accident injuring Missouri resident in a Missouri plant on the grounds that the sales agent would not have expected New York law to

apply); *In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 125-26, 912 P.2d 761 (1996) (it was reasonable for the parties to expect that parental obligations would be determined by the law of Kansas, where the child resided): *Stutsman v. Kaiser Foundation Health Plan*, 546 A.2d 367, 375 (D.C. 1988) (application of Virginia law to bar a District of Columbia-sited loss of consortium claim was appropriate in view of the reasonable expectations of the parties based on their Virginia residence).

When they entered into their Vermont civil union in November 2003, the parties could not have reasonably expected that the civil union statute of that state would regulate the relationship between them, or determine the parentage of the child who was born in New York the following month. The Petitioner's undisputed testimony in the record is that she regarded the statute as being of no legal effect in New York and had been advised accordingly. This expectation was reasonable, because both the history of the statute and the case law construing it indicated that the Vermont law was of no force outside Vermont, even under a full faith and credit analysis, and a review of New York cases reflected that *Alison D.*, which announced that New York did not grant visitation or custody rights to biological or adoptive strangers to children, embodied the strong policy of New York. Because the parties had no reasonable expectation that Vermont law would determine the question of the parentage of M.R. and visitation rights, the Court of Appeals' application of that law to determine parentage in derogation of the law of New York, the only state having significant contacts to this case, was

unreasonable, arbitrary, and fundamentally unfair, and violated the Petitioner's due process rights. Accordingly, this Petition should be granted and this matter should be remanded to the New York Court of Appeals with instructions to reverse its decision.

A. The Reasonable Expectation Of The Parties Was That The Vermont Civil Union Statute Would Have No Force In New York, Where They Lived.

The Petitioner and her ex-partner could not have reasonably expected Vermont law to apply to determine parentage issues here. The record shows that the couple never intended to live in Vermont, and never did so. Their one incidental contact with Vermont was that they traveled there for a single day in order to enter into a civil union. The parties are both, and have always been, New York residents. Before, during, and after their civil union, and to the present, they have lived only in New York. Their agreement to enter into a civil union was arrived at in New York. The child resulting from the artificial insemination, M.R., custody of whom is the central issue in this case, was born in New York, has lived in New York since his birth, and does so today. Indeed the child has never set foot in Vermont.

Also, the parties could not have reasonably thought that the courts of New York would give full faith and credit to the Vermont civil union statute. The only published New York case giving any effect to the Vermont civil union statute at that time was *Langan v St. Vincent Hospital*, 196 Misc.2d 440 (Supreme Court 2003), which only construed the scope of the civil union statute on New York's wrongful death statute. The *Langan* court

expressly limited its decision to that question, and acknowledged that it was not deciding the extra-jurisdictional effect of the Vermont statute in New York for any other purpose. 196 Misc. 2d at 444-45. *Langan* does nothing to alter the conclusion that New York had a strong public policy against equating same-sex unions solemnized in other states with marriages and certainly does not alter the conclusion that civil unions are not recognized for any purposes under New York law: a conclusion reinforced in 2005 when New York's Appellate Division, Second Department, reversed the trial court in *Langan. Langan v. St. Vincent Hospital*, 25 A.D.3d 90, 95, 802 N.Y.S.2d 476 (2d Dep't 2005).

More importantly, the New York Court of Appeals has specifically held that the question of the recognition of out-of- state marriage, -never mind civil unions, is one the legislature must answer. *Godfrey v. Spano*, 13 N.Y.3d 858 (2009). The same Court declined to find a fundamental right to same sex marriage (and thereby civil unions), thereby deferring to the legislature on this issue as well. *Id.; Hernandez v. Robles*, 7 N.Y.3d 338 (2006). It cannot be otherwise with respect to parentage rights allegedly arising out an otherwise unrecognized Vermont civil union of two New York residents. Indeed, it is noteworthy that one cannot even dissolve a Vermont civil union in New York courts, unless one of the parties resides in Vermont, which is not and never has been the case here. 15 V.S.A. § 1206; *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 456-57 (2000). It is further noteworthy that even if the New York Court of Appeals had somehow extended to this civil union the same recognition accorded an in-state heterosexual marriage — presumably the highest and best form of relief Debra

H. could obtain – Debra H. would still lack standing to seek custody and visitation of M.R. under New York law given that the civil union took place just one month before Janice gave birth, thus negating the presumption of parenthood granted to heterosexual married couples since the child was clearly conceived before the union. McKinney's Practice Commentaries, DRL §24, by Alan D. Scheinkman (presumption created by child's birth more than nine months after the marriage); New York Domestic Relations Law §§ 24, 73. And of course, recognition of a civil union in New York for any purpose was not in fact the law at any time prior to the New York Court of Appeals' decision in the case at bar. *Langan v. St. Vincent's Hosp. of NY*, 25 A.D.3d 90, 802 N.Y.S.2d 475), (2nd Dep't 2005), *appeal dismissed*, 6 N.Y.3d 890, 817 N.Y.S.2d 625 (2005); *See* May 14, 2008, memorandum from David Nocenti in Governor Patterson's Executive Chamber regarding *Martinez* decision on same-sex marriages available at *http://data.lambdalegal.org/in-court/downloads/execnyo20080514governor-directive-same-sex-marriage. pdf.* (requiring state agencies to recognize out of state same sex marriages but not mentioning civil unions)

By ignoring its own State's strong social policy and by applying the laws of Vermont to determine the sole issue of M.R.'s parentage, not only was the New York Court of Appeals violating the Petitioner's and M.R's fundamental rights, but it was essentially cherry-picking the Vermont law to apply only one singular aspect of that law while New York law continues to prohibit recognition of such unions for all other purposes. Thus, the Petitioner submits, the New York Court of Appeals

acted in a manner that was fundamentally unfair and arbitrary, by violating the reasonable expectations of the parties and by utterly disregarding the patently overwhelming state interests of New York and Vermont's lack of a legitimate state interest in this dispute.

Significantly, at the time the parties entered into a civil union in November 2003, state courts that addressed the extra-jurisdictional effect of the Vermont civil union statute had generally held that a Vermont civil union was without force in any state outside Vermont, even under a full faith and credit analysis. *See, e.g., Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (2002) (where Georgia legislature had expressed a public policy against recognizing same-sex marriage and where the Vermont statute distinguished between "marriage" and "civil union," a Vermont civil union was not cognizable as a "marriage" for purposes of complying with a consent decree prohibiting visitation while cohabiting with an unmarried partner).

For instance, in *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002), *appeal dismissed as moot*, 261 Conn. 936-37, 806 A.2d 1066 (2002), plaintiff, a Connecticut resident, sought to dissolve his same-sex civil union entered into in Vermont. The Appellate Court of Connecticut affirmed the decision of the lower court to dismiss an action to dissolve the civil union for lack of subject matter jurisdiction. The court stated flatly that "the statutes of Vermont do not have extraterritorial effect," *id.* at 385. Turning to the claim that the Connecticut court should give the Vermont statute full faith and credit, the court observed that "other than

having entered the civil union in Vermont, neither party to the civil union has any other significant contact with that state," *id.* at 386. Reasoning that the full faith and credit clause of the Constitution obligates the forum state to recognize and apply foreign law only "subject to the forum's own interest in furthering its public policy," the court concluded that Connecticut did not have a clear public policy in favor of recognizing civil unions. *Id.* at 385-86. Based on this conclusion, the court determined that a same-sex union was not a "family relations" matter within Connecticut's domestic relations statute, and affirmed the dismissal of the case. *Id.* at 386-95.

The parties could only have reasonably thought that New York, similarly, had a strong public policy against the recognition of the Vermont civil union. Indeed, New York has always had a strong policy against affording judicial recognition to same-sex marriages, and while the Vermont statute distinguishes between civil unions and marriages, it does so only in title, since it provides that "[p]arties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a civil marriage." 15 V.S.A. § 1204 (a).

In November 2003, New York's public policy against recognizing same-sex marriages for purposes of its statutes was well-documented. Throughout the period of the parties' relationship, New York had a clear and unequivocal policy, announced in the New York Court of Appeals decision of *Alison D. v. Virginia M.*, 77

N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), of not recognizing the custody claims of biological and adoptive strangers to a child, subject to an exception of "extraordinary circumstances" not applicable here, usually entailing a showing of harm to the child. This policy has been repeatedly reaffirmed by New York courts, before, during, and after the period of the parties' relationship. *Bank v. White*, 40 A.D.3d 790, 837 N.Y.S.2d 181 (2d Dep't 2007); *Burgess v. Ash*, 41 A.D.3d 473, 838 N.Y.S.2d 583 (2d Dep't 2007); *Behrens v. Rimberg*, 32 A.D.3d 929, 822 N.Y.S.2d 285 (2d Dep't 2006); *Anonymous v. Anonymous*, 20 A.D.3d 333, 797 N.Y.S.2d 754 (1st Dep't), *appeal dismissed*, 6 N.Y.3d 740, 843 N.E.2d 1149, 810 N.Y.S.2d 409 (2005); *Matter of C.M.*, 6 Misc.3d 361, 365, 789 N.Y.S.2d 393 (N.Y. Co. 2004); *Multari Jr. v. Sorrell*, 287 A.D.2d 764, 731 N.Y.S.2d 238 (3d Dep't 2001); *Perry-Rogers v. Fasano*, 276 A.D.2d 67, 715 N.Y.S.2d 19 (1st Dep't 2000); *Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998). The New York courts' disinclination to recognize a sister state's civil union law on the grounds of comity was reinforced in *Langan v. St. Vincent Hospital*, 25 A.D.3d 90, 95, 802 N.Y.S.2d 476 (2d Dep't 2005). The parties could only have reasonably expected that the rule in *Alison D.* would apply to their relationship, and that Respondent would not have parent status.

Moreover, as acknowledged by the New York Court of Appeals, during their relationship, Respondent had requested that Petitioner grant her parent status by allowing a second-party adoption as afforded by the New York Court of Appeals in *Matter of Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995), but Petitioner rebuffed these requests. Thus, the record reflects that

both parties were aware throughout their relationship that the Respondent did not have a "parent" status within the civil union, and could not have reasonably thought that the Respondent would be entitled to custody and visitation in the event the civil union dissolved.

The Court of Appeals did not take into account the reasonable expectations of the parties that the Vermont civil union statute was of no legal effect. Case law in New York and in other states so reflected, and there was evidence in the record to this effect. The Court of Appeals' application of Vermont law in the face of these facts amounted to a deprivation of the Petitioner's and M.R.'s substantive due process rights. Under these circumstances, this Court should grant the Petition.

B. Vermont Has No Legitimate Interest In This Parentage Determination, While A Weighing Of Contacts Overwhelmingly Favors Application Of New York Law.

In order to safeguard Petitioner's constitutional rights, the New York Court of Appeals was required to consider several factors in making its choice of law determination. The most critical of these, besides the expectations of the parties, are the significance of "the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation" and "the legitimate interest of the forum state in the controversy before it. *Hague, supra,* 449 U.S. at 308, 318, n.24 (Stevens, J., concurring in judgment), and at 449 U.S. at 333 (per Powell, J., concurring in judgment).

The application of Vermont law is arbitrary because Vermont has no legitimate interest in this purely New York dispute. The Vermont Supreme Court held in *Baker v. State,* 170 Vt. 194, 744 A.2d 864 (1999) that Vermont was constitutionally required to extend to same-sex couples the same benefits and protections provided to married couples. The court held that Vermonters had the right under the Common Benefits Clause of the state's Constitution to "common benefits and protections that flow from marriage *under Vermont law*" 170 Vt. At 226, 744 A.2d at 887. (emphasis supplied). Thus, the court reasoned that same-sex couples were entitled to legal acknowledgment "*as Vermonters* who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship." 170 Vt. 194 at 229, 744 A.2d at 889 (1999) (emphasis supplied).

The following year, the Vermont legislature enacted its civil union statute. This act was responsive to the concerns identified in *Baker. Brady v. Dean,* 173 Vt. 542, 542, 790 A.2d 428 (2001). The language in *Baker* emphasized above strongly indicates, and the legislative history and language of the civil union statute does not gainsay, that the court's and legislature's actions were intended to apply to *Vermonters* only. Nothing in either the *Baker* decision or in the statutory language suggests that the statute was intended to affect the rights of same-sex couples domiciled outside Vermont, such as the parties herein.

The Vermont Supreme Court's decision in *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 912 A.2d 951 (2006) is not to the contrary. In *Miller-Jenkins,* the court

determined that both parties in a same-sex civil union were "parents" under the Vermont civil union statute. *Id.* at 459-69. In *Miller-Jenkins,* the parties lived together in Vermont for over a year, and litigated the dissolution of their civil union in the Vermont courts. *Id.* at 445. That factor distinguishes that case from the case at bar, with which Vermont has absolutely no contact other than the fact that the parties chose to avail themselves of the Vermont civil union statute.

The Court of Appeals' action here was arbitrary and fundamentally unfair because the court did not make any attempt to weigh the relative interests of New York and Vermont in this dispute. Since New York has a preponderance of contacts with the facts here, such an analysis would favor the application of New York law. Generally, where courts are faced with a decision as to which state's law to apply, they engage in an assessment of the contacts between the state and the facts of the dispute. That weighing process is at the core of the *Hague* test of assessing the significance of contacts. In particular, in cases concerning parental rights where a child was conceived by artificial insemination such as the case at bar, state courts of last resort have satisfied the significant contact or significant aggregation of contacts standard by weighing contacts between the parties and different states. *See, e.g., In re K.M.H.*, 285 Kan. 53, 59-62 (2007) (in artificial insemination case, Kansas law would apply rather than Missouri where the only contact with Missouri was that the insemination clinic was located there, and the parties resided in Kansas, entered into their agreement in Kansas, and the child was born in Kansas); *In re Marriage of Adams,* 133 Ill.2d 437, 447, 551 N.E.2d 635 (1990) (in artificial

insemination case involving a heterosexual married couple, Florida law would apply rather than Illinois where parties had been Florida residents, artificial insemination had been performed in Florida, and baby was born in Florida, and only contact with Illinois was that the wife had moved there for the divorce). Indeed, contrary to the approach taken here by the New York Court of Appeals in purporting to apply the Vermont law, Vermont itself weighs various factors to determine if a party to a Vermont civil union, who is a biological stranger to a child born as a result of artificial insemination, is a "parent" for purposes of custody of the child. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 465, 912 A.2d 951 (Vt. 2006).

A consideration of the relative significance of the New York and Vermont contacts and other factors compels the conclusion that Vermont law should not have been applied here. The parties are both, and have always been, New York residents. Before, during, and after their civil union, and to the present, they have lived only in New York and nowhere else. Their agreement to enter into a civil union was arrived at in New York. The artificial insemination was performed in New York. The child resulting from the artificial insemination, M.R., custody of whom is the central issue in this case, was born in New York, has lived in New York since his birth, and does so today.

Thus, New York has not only a preponderance but all but one of the contacts with the parties and this custody dispute, while Vermont has only one incidental contact with them. The application of Vermont law by the New York Court of Appeals to afford parental and

custody rights to a non-parent in the face of these facts fits the dictionary definition of "arbitrary": "capricious; unreasonable; unsupported." (*Random House Dictionary*, 2010). It thwarts the reasonable expectations of the parties so as to violate the Petitioner's Due Process and Equal Protection rights. Most importantly, it conflicts with the settled law in the area of conflict of laws.

By not applying the law of New York — the State in which the couples resided, where the artificial insemination was performed, and in which the child M.R. was born – to the issue of child custody, the New York Court of Appeals acted in a manner that was "arbitrary" and "fundamentally unfair" so as to violate the Petitioner's fundamental parental rights under the Due Process and Equal Protection clauses of the U.S. Constitution. Accordingly, this Court should grant this Petition, so that it can instruct the New York Court of Appeals on the constitutionally required standard for choice of law.

II. THE DECISION OF THE NEW YORK COURT OF APPEALS INFRINGED ON THE CONSTITUTIONAL RIGHTS OF FIT NATURAL PARENTS RECOGNIZED BY THIS COURT IN *TROXEL V. GRANVILLE*, 530 U.S. 57 (2000).

This Court has held repeatedly that the Due Process Clause of the Fourteenth Amendment protects the rights of fit natural parents to direct and govern the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 69-70, (2000); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Stanley v. Illinois*,

405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

In *Troxel v. Granville*, *supra*, 530 U.S. 57, 65-66 (2000), the United States Supreme Court reasoned that the right of fit natural parents to make decisions regarding the care, custody and control of their children is "fundamental" under the Due Process Clause of the Fourteenth Amendment. *Troxel* involved a constitutional challenge to a Washington statute permitting "any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." *Id.* at 67. A mother sought to limit her children's visits with their paternal grandparents, and pursuant to the statute, the trial court ordered visitation over the mother's objection. The Washington Supreme Court held that the statute was facially invalid and remanded, holding *inter alia* that the statute violated the fundamental liberty interests of fit natural parents because the Constitution only allows interference with the rights of fit natural parents if a compelling state interest, that is a threshold showing of harm to the child, is made. *In re Custody of Smith*, 137 Wash.2d 1, 13-16, 969 P.2d 21 (1998). This Court affirmed in a plurality opinion, reasoning *inter alia* that the trial court had failed to honor the traditional presumption that a fit parent will act in the best interest of her child and that the trial court had erred by failing to give special weight to the fit mother's determination of her child's best interest. *Troxel*,530 U.S. at 68-69.

By awarding the status of "parent" to a person who is a non-parent under New York law, the Court of

Appeals similarly infringed on the fundamental liberty rights of the Petitioner, a fit natural parent who must be presumed to be acting in the best interests of her child. Here, the New York Court of Appeals, while announcing a strong and unequivocal policy that its Legislature did not grant parental status to biological or adoptive strangers to children under New York's visitation statute, nonetheless granted the Respondent visitation rights under the statute of a foreign jurisdiction with only an incidental contact with the parties and the facts. Under New York law, the Respondent is not a "parent," and only Petitioner is a "parent." Moreover, Vermont's highest court, in construing the civil union statute, reviewed a range of factors including the expectations of the parties in reaching the conclusion that the civil union ex-partner who had no biological connection to the child was a "parent" for purposes of the Vermont statute. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441,465, 912 A.2d 951 (2006). The Court of Appeals did not consider whether any of these factors were present in the instant case. Consequently, even assuming the applicability of Vermont law, the granting of visitation rights to the Respondent as a "parent" was premature because no hearing had been held to inquire into the *Miller-Jenkins* factors, including the expectation of the parties. The New York Court of Appeal's ruling thus swept too broadly and violated the Petitioner's substantive due process rights as a fit natural parent.

New York has a strong policy in favor of protecting the rights of fit natural parents, expressed in its Domestic Relations Law §70 and *Alison D.*, which limits parental rights to biological and adoptive parents. By

awarding a non-parent the status of parent, the New York Court of Appeals undermined its own State's policy and also the fundamental liberty interest described in *Troxel.*

The scope of the fundamental liberty interest identified in *Troxel* is implicated in this case where a fit biological parent such as the Petitioner is confronted with a non-parent claiming parent-like status and parental rights. Given the hodge-podge of inconsistent laws evolving throughout the nation, clarification of exact scope of this fundamental liberty interest is becoming a nationally important issue. This Court should grant this Petition in order to clarify the critical importance of the fundamental liberty interests identified in *Troxel* and its progeny.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MAY 4, 2010

COURT OF APPEALS OF NEW YORK

DEBRA H.,

Appellant,

v.

JANICE R.,

Respondent.

May 4, 2010.

OPINION OF THE COURT

READ, J.

Respondent Janice R. is the biological mother of M.R., a six-year-old boy conceived through artificial insemination and born in December 2003. Janice R. and petitioner Debra H. met in 2002 and entered into a civil union in the State of Vermont in November 2003, the month before M.R.'s birth. Janice R. repeatedly rebuffed Debra H.'s requests to become M.R.'s second parent by means of adoption.

After the relationship between Janice R. and Debra H. soured and they separated in the spring of 2006, Janice R. allowed Debra H. to have supervised visits with M.R. each week on Sunday, Wednesday and Friday

for specified periods of time, as well as daily contact by telephone. In the spring of 2008, however, Janice R. began scaling back the visits. By early May 2008, she had cut off all communication between Debra H. and M.R.

In mid-May 2008, Debra H. brought this proceeding against Janice R. in Supreme Court by order to show cause. She sought joint legal and physical custody of M.R., restoration of access and decisionmaking authority with respect to his upbringing, and appointment of an attorney for the child.[1] After a hearing on May 21, 2008, the judge signed the order to show cause, which set a briefing schedule, and the parties, at his instance, entered into a "so-ordered" stipulation that reinstated the three-day-a-week visitation schedule previously followed. The stipulation required M.R.'s nanny or a mutually agreed-upon third party to accompany M.R. when he visited Debra H.

As Supreme Court later put it, "few facts . . . [were] undisputed" at the hearings and in the parties' submissions, which "differ[ed] substantially with respect to the nature and extent of [Debra H.'s] relationship with [Janice R.] and, more significantly, with M.R." (N.Y.L.J., Oct. 9, 2008, at 26, col. 1, 2008 WL 7675822, 2008 N.Y. Misc. LEXIS 6367, *1, 5 [Sup.Ct., N.Y. County 2008]). At the hearing on July 10, 2008, Debra H.

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1. After Janice R. and Debra H. broke up, Janice R. conceived another child through artificial insemination. Debra H. does not claim to have developed any relationship with this child, who was born after she brought this action.

acknowledged our decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), which held that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent, but contended that *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199, 853 N.E.2d 610 (2006) endorsed a nonbiological or nonadoptive parent's right to invoke equitable estoppel to secure visitation or custody notwithstanding *Alison D.* In support of this interpretation of our precedents, Debra H. emphasized that *Shondel J.* cited *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 676 N.Y.S.2d 677 (2d Dept.1998), a divorce proceeding in which the husband successfully invoked equitable estoppel to seek custody and visitation with a child born to the wife prior to the marriage, whom he neither fathered nor adopted. Debra H. also urged Supreme Court to consider the effect of the parties' civil union, and alluded to the Vermont Supreme Court's decision in *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951 (2006), *cert. denied* 550 U.S. 918, 127 S.Ct. 2130, 167 L.Ed.2d 863 (2007).

In opposition to Debra H.'s application, Janice R. stressed that she had always spurned Debra H.'s entreaties to permit a second-parent adoption. She argued that *Alison D.*, which interpreted Domestic Relations Law § 70, was not eroded or overruled by *Shondel J.*, a case involving a filiation determination; pointed out that the Legislature did not amend section 70 after *Alison D.* was handed down, or elsewhere enact any provision broadening standing to seek visitation or

custody; and observed that Janice R. conceived M.R. prior to entering into the civil union with Debra H. in Vermont. At the hearing's conclusion, Supreme Court reserved decision and continued visitation in a further "so-ordered" stipulation.

In a decision and order filed on October 9, 2008, Supreme Court ruled in Debra H.'s favor. The judge reasoned that "it [was] inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking [equitable estoppel] against the biological parent in order to maintain an established relationship with the child" since, in either event, "the court's primary concern should be furthering the best interests of the child" (2008 WL 7675822, 2008 N.Y. Misc. LEXIS 6367, *25).

Supreme Court concluded that the facts alleged by Debra H., if true, "establish[ed] a prima facie basis for invoking the doctrine of equitable estoppel" (*id.* 2008 WL 7675822, 2008 N.Y. Misc. LEXIS 6367 at *25-26). In this regard, the judge considered the parties' civil union to be "a significant, though not necessarily a determinative, factor in [Debra H.'s] estoppel argument" because, under Vermont law, "parties to a civil union are given the same benefits, protections and responsibilities . . . as are granted to those in a marriage," which "includes the assumption that the birth of a child during a couple's legal union is 'extremely persuasive evidence of joint parentage' " (*id.* 2008 WL 7675822, 2008 N.Y. Misc. LEXIS 6367 at *26, quoting *Miller-Jenkins,* 180 Vt. at 466, 912 A.2d at 971).

Because of the many contested facts, however, Supreme Court ordered another hearing to resolve whether Debra H. stood in loco parentis to M.R., as she asserted, and therefore possessed standing to seek visitation and custody. The judge noted that, in the event Debra H. succeeded in proving the facts that she alleged, a further hearing would then be required to assess whether it was in M.R.'s best interest to award Debra H. visitation and/or custodial rights. Supreme Court continued the existing "so-ordered" stipulation permitting supervised visitation, and also granted Debra H.'s request for appointment of an attorney to represent the child.

Janice R. appealed, and obtained a stay of the equitable-estoppel hearing ordered by Supreme Court, pending disposition of the appeal. On April 9, 2009, the Appellate Division unanimously reversed on the law, vacated Supreme Court's order, denied the petition, and dismissed the proceeding. The court acknowledged that while the "record indicate[d] that [Debra H.] served as a loving and caring parental figure during the first 2 1/2 years of [M.R.'s] life, she never legally adopted [him]" and, in accordance with *Alison D.*, "a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70" (61 A.D.3d 460, 461, 877 N.Y.S.2d 259 [1st Dept.2009]). The Appellate Division commented that, to the extent that denial of any right to equitable estoppel in this case might be considered inconsistent with *Shondel J.* and *Jean Maby H.*, its own "reading of precedent [was] such that the

doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation" (*id.*).

Both Debra H. and the attorney for the child asked the Appellate Division for a stay of enforcement so as to allow visitation to continue until further appellate proceedings were completed, and for leave to appeal to us. Pending resolution of those motions, a Justice of the Appellate Division granted Debra H.'s emergency application for an interim stay and allowed Sunday visitation. After the Appellate Division denied the motions on June 25, 2009 (2009 N.Y. Slip Op. 76701[U], 2009 WL 1852908), Debra H. and the attorney for the child separately asked us for leave to appeal and sought another stay.

On July 13, 2009, a Judge of this Court signed a "so-ordered" stipulation continuing one-day-a-week visitation. And on September 1, 2009, we granted Debra H. and the attorney for the child permission to appeal (13 N.Y.3d 702, 886 N.Y.S.2d 93, 914 N.E.2d 1011 [2009]). We also approved their request for a further stay to the extent of reinstating and permitting enforcement of so much of Supreme Court's order as allowed Debra H. to have Sunday visitation with M.R. (13 N.Y.3d 753, 886 N.Y.S.2d 89, 914 N.E.2d 1006 [2009]). We now reaffirm our holding in *Alison D.*, but reverse the Appellate Division's order in this case for reasons of comity in light of Debra H.'s status as M.R.'s parent under Vermont law.

Appendix A

I.

Domestic Relations Law § 70(a) provides that

> "[w]here a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will promote its welfare and happiness, and make award accordingly" (emphasis added).

In *Alison D.*, we decided that section 70 does not confer standing on a biological stranger to seek visitation with a child in the custody of a fit parent. Debra H. urges us to exercise what she characterizes as long-standing common-law and equitable powers to recognize the parentage of a nonbiological, nonadoptive individual on a theory of equitable estoppel and in the child's best interest. As a consequence, she asks us to revisit and either distinguish or overrule *Alison D.*, a case that closely resembles this one factually.

Appendix A

Alison D., the former romantic partner of Virginia M., petitioned for visitation with Virginia M.'s child under Domestic Relations Law § 70. According to Alison D., she and Virginia M. established a relationship, began living together, and decided to have a child whom Virginia M. would conceive through artificial insemination. They agreed to share all parenting responsibilities, and continued to do so for the first two years of the child's life. When the child was about 2 1/2 years old, however, the parties ended their relationship and Alison D. moved out of the family home. The parties adhered to a visitation schedule for a time, but Virginia M. at first restricted and eventually stopped Alison D.'s contact with the child.

When the case reached us, we rejected Alison D.'s argument that she "acted as a '*de facto' parent* or that she should be viewed as a *parent 'by estoppel'* " (*Alison D.*, 77 N.Y.2d at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27 [emphasis added]). As we explained,

> "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent . . . To allow the courts to award visitation-a limited form of custody-to a third person would necessarily impair the parents' right to custody and control" (*id.* at 656-657, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Because Alison D. "concede[d] that [Virginia M. was] a fit parent," she had "no right to petition the court to displace the choice made by the fit parent in deciding what is in the child's best interests" (*id.* at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Citing Domestic Relations Law §§ 71 and 72 (permitting siblings and grandparents respectively to petition for visitation), we emphasized that "[w]here the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests" (*id.*). Thus, we refused to "read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child" (*id.*).

In support of our decision in *Alison D.*, we cited *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976) and *Matter of Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 517 N.Y.S.2d 932, 511 N.E.2d 75 (1987), cases which set forth bedrock principles of family law. In *Bennett*, we held that the State "may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (40 N.Y.2d at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277). Where extraordinary circumstances are present, the court determines custody based on the child's best interest. Concomitantly, in *Ronald FF.*, we held that "[v]isitation

rights may not be granted on the authority of the . . . *Bennett* . . . extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother" (70 N.Y.2d at 142, 517 N.Y.S.2d 932, 511 N.E.2d 75); and further noted that the mother possessed a fundamental right "to choose those with whom her child associates," which the State may not "interfere with . . . unless it shows some compelling State purpose which furthers the child's best interests" (*id.* at 144-145, 517 N.Y.S.2d 932, 511 N.E.2d 75).

In *Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995), decided four years after *Alison D.*, we construed section 110 of the Domestic Relations Law, New York's adoption statute, to permit "the unmarried partner of a child's biological mother, *whether heterosexual or homosexual*, who is raising the child together with the biological parent, [to] become the child's second parent by means of adoption" (*id.* at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27 [emphasis added]). We stressed that permitting such second-parent adoptions "allows . . . children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in [*Alison D.*]" (*id.* at 659, 569 N.Y.S.2d 586, 572 N.E.2d 27).[2]

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2. While Judge Ciparick criticizes *Alison D.* for taking an "unwarranted hard line stance, fixing biology above all else as the key to determining parentage" (*see* Ciparick, J., concurring op. at 607, 904 N.Y.S.2d at 280, 930 N.E.2d at 201), our subsequent decision in *Jacob* softened any such "hard line" by permitting second-parent adoption.

Appendix A

Although Debra H. argues otherwise, we did not implicitly depart from *Alison D.* in *Shondel J.*, where there were affirmed findings of fact that Mark D. had held himself out as the child's biological father, and had treated her as his daughter for the first 4 1/2 years of her life. When Shondel J. sought orders of filiation and support, Mark D. requested DNA testing. The Family Court hearing examiner ordered genetic marker tests, which revealed that Mark D. was not, in fact, the child's biological father. As we pointed out, *Shondel J.* was an unusual case because "the process was inverted": "The procedure contemplated by [sections 418(a) and 532(a) of the Family Court Act] is that Family Court should consider paternity by estoppel *before* it decides whether to test for biological paternity" (7 N.Y.3d at 330, 820 N.Y.S.2d 199, 853 N.E.2d 610 [emphasis added]; *see* Family Ct. Act § 418[a] [governing paternity where there is a marriage] and § 532[a] [governing paternity where there is no marriage], which both specify that "[n]o [genetic marker or DNA] tests shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman").

We held in *Shondel J.* that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment" (7 N.Y.3d at 324, 820 N.Y.S.2d 199, 853 N.E.2d 610). We premised our decision on "our

precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel" (*id.* at 326, 820 N.Y.S.2d 199, 853 N.E.2d 610). On the latter point, we highlighted that although paternity by estoppel for purposes of child support "originated in case law," it was "now secured by statute in New York"; namely, sections 418(a) and 532(a) of the Family Court Act (*id.* at 327, 820 N.Y.S.2d 199, 853 N.E.2d 610).

We did not mention *Alison D.* in *Shondel J.* Nor did we intend to signal disaffection with *Alison D.* by citing *Jean Maby H.*, one of a handful of lower court decisions applying equitable estoppel to custody and visitation proceedings despite *Alison D.*, where we considered and explicitly rejected this approach (*see Alison D.*, 77 N.Y.2d at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27). Specifically, after noting that "New York courts have long applied the doctrine of estoppel in *paternity and support proceedings* [because of] the best interests of the child" (*Shondel J.*, 7 N.Y.3d at 326, 820 N.Y.S.2d 199, 853 N.E.2d 610), we cited *Jean Maby H.* The pinpoint citation was made to a page where the Appellate Division similarly observed that courts have recognized equitable estoppel "as a defense in various proceedings involving *challenges to paternity*, including cases where there is evidence that the person seeking to avoid estoppel is not a biological parent" (*see Jean Maby H.*, 246 A.D.2d at 285, 676 N.Y.S.2d 677 [citations omitted and emphasis added]), and that "[t]he paramount concern in applying equitable estoppel in *these cases* has been, and continues to be, the best interests of the child" (*id.* [emphasis added]).

Appendix A

Our holding in *Shondel J.* was limited to the context in which that case arose-the procedure for determining the paternity of an "alleged father." Moreover, we see no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. As already noted, the Legislature has drawn the distinction for us: sections 418(a) and 532(a) of the Family Court Act direct the courts to take equitable estoppel into account before ordering paternity testing, while section 70 of the Domestic Relations Law does not even mention equitable estoppel. The procedure dictated by sections 418(a) and 532(a) is intended to prevent someone who has held himself out as a child's biological father from later evading the financial obligations of paternity by means of a scientific litmus test, thereby endangering the child's economic security or even rendering the child a ward of the State. This may on occasion result in deeming a biological relationship to exist where the putative father is, in fact, a biological stranger to the child, as turned out to be the case in *Shondel J.* (*see Shondel J.*, 7 N.Y.3d at 331, 820 N.Y.S.2d 199, 853 N.E.2d 610 [Cautioning that "a man who harbors doubts about his biological paternity has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship"]). Debra H. would have us upend this rationale by allowing someone who is a *known* biological stranger to a child assert a parental relationship over the objections of the child's biological parent. *Shondel J.* is consistent with *Alison D.'s* core holding

that parentage under New York law derives from biology or adoption.

In sum, *Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of "disruptive . . . battle[s]" (*Jacob*, 86 N.Y.2d at 659, 636 N.Y.S.2d 716, 660 N.E.2d 397) over parentage as a prelude to further potential combat over custody and visitation. While Debra H. and various amici in this case complain that *Alison D.* is formulaic, or too rigid, or out of step with the times, we remain convinced that the predictability of parental identity fostered by *Alison D.* benefits children and the adults in their lives. All four departments of the Appellate Division have consistently followed *Alison D.* (*see e.g. Anonymous v. Anonymous*, 20 A.D.3d 333, 797 N.Y.S.2d 754 [1st Dept.2005], *appeal dismissed* 6 N.Y.3d 740, 810 N.Y.S.2d 409, 843 N.E.2d 1149 [2005]; *Bank v. White*, 40 A.D.3d 790, 837 N.Y.S.2d 181 [2d Dept.2007], *lv. dismissed* 9 N.Y.3d 1002, 849 N.Y.S.2d 28, 879 N.E.2d 169 [2007]; *Gulbin v. Moss-Gulbin*, 45 A.D.3d 1230, 846 N.Y.S.2d 743 [3d Dept.2007], *lv. denied* 10 N.Y.3d 705, 857 N.Y.S.2d 37, 886 N.E.2d 802 [2008]; *Matter of Lynda A.H. v. Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 [4th Dept.1998], *lv. denied* 92 N.Y.2d 811, 680 N.Y.S.2d 457, 703 N.E.2d 269 [1998]).

Despite this evidence to the contrary, Debra H. also protests that *Alison D.* has spawned doubt and confusion in the law in the 19 years since it was handed down. To cure this ostensible ill, though, Debra H. asks

us to replace the bright-line rule in *Alison D.* with a complicated and nonobjective test for determining so-called functional or de facto parentage[3] at an equitable-estoppel hearing to be conducted by the trial court after discovery and fact-intensive inquiry in the individual case. These equitable-estoppel hearings-which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction-are likely often to be contentious, costly, and lengthy. Here, for instance, the two sides collectively submitted affidavits to Supreme Court from at least 60 individuals, any or all of whom might be expected to testify at the equitable-estoppel hearing.

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3. At oral argument, Debra H. advocated for the standard established by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 193 Wis.2d 649, 533 N.W.2d 419 (1995). After first concluding that Wisconsin's visitation statute was not the exclusive means of obtaining court-ordered visitation and therefore did not preclude an exercise of its equitable powers, the Wisconsin Supreme Court, "mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," decided that a trial court may "determine whether visitation is in a child's best interest if the petitioner *first proves* that he or she has *a parent-like relationship* with the child and that *a significant triggering event* justifies state intervention in the child's relationship with a biological or adoptive parent" (193 Wis.2d at 658, 533 N.W.2d at 421 [emphases added]). The court further determined that "[t]o meet these two requirements, the petitioner must prove the component elements of each one" (193 Wis.2d at 658, 533 N.W.2d at 421).

Specifically,

"[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature" (193 Wis.2d at 658-659, 533 N.W.2d at 421).

The contribution to a child's support (the third element) need not be monetary. Finally,

"[t]o establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the

> child, and that petitioner sought court ordered visitation within a reasonable time after the parent's interference" (193 Wis.2d at 659, 533 N.W.2d at 421).

More to the point, the flexible type of rule championed by De-bra H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.[4] Significantly, "the interest of parents in the care, custody, and control of their children[ ] is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court (*Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 [2000]). Courts must be sensible of "the traditional presumption that a fit parent will act in the best interest of his or her child"

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4. Judge Ciparick counters that the biological or adoptive parent may simply withhold "consent[ ] to the formation of [a] parental relationship between the [third party] and the child" (*see* Ciparick, J., concurring op. at 609, 904 N.Y.S.2d at 282, 930 N.E.2d at 203). This is no answer since the parent cannot predict the inherently unpredictable—i.e., how a judge might someday rule on the question of whether or when there had been sufficient "consent" such that, as a consequence, a "parental relationship" had been "formed." And erecting a Chinese wall to isolate the child from those adults who play a significant role in the parent's life is probably not practical, and is certainly not desirable for either the child or the parent.

and protect the parent's "fundamental constitutional right to make decisions concerning the rearing of" that child (*id.* at 69-70, 120 S.Ct. 2054). In our view, this fundamental right entitles biological and adoptive parents to refuse to allow a second-parent adoption, as Janice R. did, even if they have permitted or encouraged another adult to become a virtual parent of the child, as Debra H. insists was the case here.

Next, we agree with Janice R. that any change in the meaning of "parent" under our law should come by way of legislative enactment rather than judicial revamping of precedent. Many states have adopted statutes expanding standing so that individuals who are not legal parents or blood relatives of a child may seek visitation and/or custody. Indiana, for example, authorizes a court to award custody to a "de facto custodian," defined as

> "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:
>
> "(1) six (6) months if the child is less than three (3) years of age; or
>
> "(2) one (1) year if the child is at least three (3) years of age" (*see* Ind. Code Ann. §§ 31-17-2-8.5, 31-9-2-35.5).

Several other states, including Colorado, Texas and Minnesota, likewise incorporate a temporal element in

their third-party standing statutes, which contributes to predictability (*see e.g.* Colo. Rev. Stat. Ann. § 14-10-123[1] [c] [person "other than a parent" may file a petition seeking allocation of parental responsibilities for the child if the person "has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care"]; Tex. Fam. Code Ann. § 102.003[a][9] ["An original suit may be filed at any time by . . . a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition"]; Minn. Stat. Ann. § 257C.08 [4] ["If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority"]; *see also* D.C. Code Ann. § 16-831.01[1]; Or. Rev. Stat. Ann. § 109.119[1]; Wyo. Stat. Ann. § 20-7-102[a]).

Before granting custody to a nonparent over the parent's objection, a court in California must "make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child" (Cal. Fam. Code § 3041[a]). "Detriment to the child" is defined to include "the harm of removal from a stable placement . . . with a person who has assumed, on a day-to-day basis, the role of [the child's] parent, fulfilling both the child's physical needs and . . .

psychological needs for care and affection, and who has assumed that role for a substantial period of time" (*id.* § 3041[c]). Notably, "[a] finding of detriment does not require any finding of unfitness of the parents" (*id.*). When making custody determinations in Virginia, the court must "give primary consideration to the best interests of the child . . . [and] assure minor children of frequent and continuing contact with both parents, when appropriate" (Va. Code Ann. § 20-124.2[B]). In addition, while "[t]he court shall give due regard to the primacy of the parent-child relationship," it "may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest" (*id.*).

As this brief discussion of how some other states have tackled the standing issue shows, different policies and approaches have been implemented legislatively throughout the nation. Debra H. would have us preempt our Legislature by sidestepping section 70 of the Domestic Relations Law as presently drafted and interpreted in *Alison D.* to create an additional category of parent-a functional or de facto parent-through the exercise of our common-law and equitable powers. But the Legislature is the branch of government tasked with assessing whether section 70 still fulfills the needs of New Yorkers. The Legislature may conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area cited by Debra H. and the amici, weigh the consequences of

various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state.

In conclusion, *Alison D.*, coupled with the right of second-parent adoption secured by *Jacob*, furnishes the biological and adoptive parents of children-and, importantly, those children themselves-with a simple and understandable rule by which to guide their relationships and order their lives. For the reasons set out in this opinion, we decline Debra H.'s invitation to distinguish or overrule *Alison D.* Whether to expand the standing to seek visitation and/or custody beyond what sections 70, 71 and 72 of the Domestic Relations Law currently encompass remains a subject for the Legislature's consideration.

II.

Our reaffirmation of *Alison D.* does not dispose of this case, however. Debra H. and Janice R. entered into a civil union in Vermont before M.R.'s birth. This circumstance presents two issues for us to decide: whether Debra H. is M.R.'s parent under Vermont law and, in the event that she is, whether as a matter of comity she is his parent under New York law as well, thereby conferring standing for her to seek visitation and custody in a best-interest hearing.

Vermont's civil union statute provides that parties to a civil union shall have "all the same benefits, protections and responsibilities under law . . . as are

granted to spouses in a marriage" (Vt. Stat. Ann., tit. 15, § 1204[a]); and that they shall enjoy the same rights "with respect to a child of whom either becomes the natural parent during the term of the civil union," as "those of a married couple" (Vt. Stat. Ann., tit. 15, § 1204[f]). In *Miller-Jenkins*, the Vermont Supreme Court relied upon these provisions to hold that a child born by artificial insemination to one partner of a civil union should be deemed the other partner's child under Vermont law for purposes of determining custodial rights following the civil union's dissolution (*Miller-Jenkins*, 180 Vt. at 464-465, 912 A.2d at 969-970). The court concluded that in the context of marriage, a child born by artificial insemination was deemed the child of the husband even absent a biological connection. In light of section 1204 and by parity of reasoning, the court decided that the same result pertained to the partner in the civil union with no biological connection to the child.

Janice R. counters that in *Miller-Jenkins* the child was conceived by artificial insemination after the parties entered into their civil union, while M.R. was conceived before her civil union with Debra H. We see no reason why the Vermont Supreme Court would reach a different result about parentage based on this distinction. The court repeatedly emphasized how important it was that the child was *born* during the civil union (180 Vt. at 465, 912 A.2d at 970 ["Many factors are present here that support a conclusion that (the partner with no biological connection to the child) is a parent, including, first and foremost, that (she and the child's biological

mother) were in a valid legal union at the time of the child's birth"]; 180 Vt. at 466, 912 A.2d at 971 ["Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue . . . We do note that, in accordance with common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage"]). Indeed, entering into the civil union at a time when both partners know that one of them is pregnant by artificial insemination might well be viewed as presenting an even stronger case than *Miller-Jenkins* to support the nonbiological partner's parentage. There is certainly no potential for misunderstanding, ignorance or deceit under such circumstance.

Janice R. does not challenge the civil union's validity. She protests, though, that it was "of utterly no consequence" to her, and that while she "gave into" Debra H.'s "demand[s]," she did not enter into the civil union "blindly." Rather, Janice R.—who is a practicing attorney—professes to have conducted research and to have "found that [entering into a Vermont civil union] was of no legal significance in the State of New York, which is still the case today." Moreover, she claims to have "conferred with an attorney to make certain that a 'civil union' was of no legal consequence," and to have been "assured that it was not." Finally, she avers that "[k]nowing that the civil union was of no legal consequence in New York and did not confer . . . any additional rights and responsibilities, combined with

[her] desire to put an end to [Debra H.'s] nagging, [she] acquiesced to the civil union."

In fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003,[5] and remain unsettled except to the extent we resolve the specific issue—i.e., parentage—presented by this case. Whatever her motivation or expectation, Janice R. chose to travel to Vermont to enter into a civil union with Debra H. In light of the *Miller-Jenkins* decision, we conclude that Debra H. is M.R.'s parent under Vermont law as a result of that choice. The question then becomes whether New York courts should accord comity to Vermont and recognize Debra H. as M.R.'s parent under New York law as well.

The doctrine of comity

> "does not of its own force compel a particular course of action. Rather, it is an expression of

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5. The first Supreme Court decision to consider the consequences in New York of a Vermont civil union was issued in April 2003-several months before Debra H. and Janice R. entered into their civil union-and was widely publicized. Although reversed by the Appellate Division in 2005, the trial court concluded that the surviving partner of a civil union validly contracted in Vermont was entitled to recognition as a "spouse" under New York's wrongful death statute and therefore had standing to recover for the wrongful death of his partner in the civil union (*see Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc.2d 440, 765 N.Y.S.2d 411 [Sup.Ct., Nassau County 2003]), *revd.* 25 A.D.3d 90, 802 N.Y.S.2d 476 [2d Dept.2005], *appeal dismissed based on tack of finality* 6 N.Y.3d 890, 817 N.Y.S.2d 625, 850 N.E.2d 672 (2006).

> one State's entirely voluntary decision to defer to the policy of another. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of cooperative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical" (*Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 580, 427 N.Y.S.2d 604, 404 N.E.2d 726 [1980] [citation omitted]).

New York's "determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict" (*id.*). The court locates the public policy of the state in "the law as expressed in statute and judicial decision" and also considers "the prevailing attitudes of the community" (*id.*). Even in the case of a conflict, however, New York's public policy may yield "in the face of a strong assertion of interest by the other jurisdiction" (*id.*).

New York will accord comity to recognize parentage created by an adoption in a foreign nation (*see Matter of Doe*, 14 N.Y.3d 100, 107-108, 896 N.Y.S.2d 741, 923 N.E.2d 1129 [2010] [comity may be extended to a Cambodian adoption certificate so that an individual who is a child's father under Cambodian law is also his father under New York law]). We see no reason to withhold equivalent recognition where someone is a parent under a sister state's law. Janice R., as was her right as M.R.'s

biological parent, did not agree to let Debra H. adopt M.R. But the availability of second-parent adoption to New Yorkers of the same sex negates any suggestion that recognition of parentage based on a Vermont civil union would conflict with our State's public policy. Nor would comity undermine the certainty that *Alison D.* promises biological and adoptive parents and their children: whether there has been a civil union in Vermont is as determinable as whether there has been a second-parent adoption. And both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage.[6] In sum, our decision does not lead to protracted litigation over standing and is consistent with New York's public policy by affording predictability to parents and children alike.

Although she sought more expansive rulings, Debra H. also made the narrower case on this appeal that "comity should be accorded to the civil union at least to

6. Vermont, like New York, does not provide by statute or case law for functional or de facto parentage (*see Titchenal v. Dexter*, 166 Vt. 373, 385, 693 A.2d 682, 689 [1997] [Vermont Supreme Court concluded that lesbian companion of adoptive mother has no right to parent-child contact as equitable or de facto parent, noting that "(g)iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem" of third parties claiming a parent-like relationship and seeking court-compelled contact with a child]).

recognize [her] as a parent to M.R.," and that "[a]cknowledging the significance to M.R. of his parents' Vermont civil union *does not require resolving* whether New York grants comity to the civil union for other purposes" (emphasis added) (*see e.g. Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272, 920 N.E.2d 328 [2009] [deciding taxpayer challenges on grounds not implicating New York's common-law marriage recognition rule]). We agree for the reasons given, and thus in this case decide only that New York will recognize parentage created by a civil union in Vermont. Our determination that Debra H. is M.R.'s parent allows her to seek visitation and custody at a best-interest hearing. There, she will have to establish facts demonstrating a relationship with M.R. that warrants an award in her favor.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for a best-interest hearing in accordance with this opinion.

GRAFFEO, J. (concurring).

I concur with Judge Read's analysis as well as the result she reaches but write separately to explain why I believe our decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) must be reaffirmed. There, we held that the term "parent" in Domestic Relations Law § 70 encompasses a biological or adoptive parent, i.e., only a person with a legally-recognized parental relationship to the child. We noted that a child's parent has a constitutionally protected right to determine with whom the child may associate. Under New York law, a legal parent's right to make such determinations "may not be displaced absent grievous cause or necessity" (*Alison D.*, 77 N.Y.2d at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27; *see Matter of Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 144, 517 N.Y.S.2d 932, 511 N.E.2d 75 [1987]; *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 356 N.E.2d 277 [1976]). A similar right has been recognized under the Federal Constitution (*see Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 [2000]). The Legislature authorizes parents to bring proceedings to ensure the proper care and custody of their children and has permitted a limited class of other persons-siblings and grandparents-standing to seek visitation in specified circumstances (*see* Domestic Relations Law §§ 71, 72; *Matter of E.S. v. P.D.*, 8 N.Y.3d 150, 831 N.Y.S.2d 96, 863 N.E.2d 100 [2007]). Rather than employing an "equitable estoppel" or "in loco parentis" basis for establishing parental status, *Alison D.* created a bright-line rule that made it possible for biological and

adoptive parents to clearly understand in what circumstances a third party could obtain status as a parent and have standing to seek visitation or custody with a child. For 19 years the rule articulated in *Alison D.* has provided certainty and predictability to New York parents and their children.

The *Alison D.* decision was criticized by some because it was unclear at that time whether a same-sex partner that was not biologically related to a child could become a legal parent through second-parent adoption. Any concern in that regard was resolved four years later in *Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995) where we held that the adoption statutes permit second-parent adoption by the unmarried partner of a child's biological parent. Thus, the law in New York is clear: a person who lacks a biological relationship to a child and desires to become a legal parent must undertake a second-parent adoption. Parents—whether in heterosexual or same-sex relationships, whether married or unmarried-have been able to order their lives accordingly. This rule has avoided confusion, particularly in the event a relationship is dissolved years later, as to whether the party lacking biological or legal ties to the child (i.e., who failed to pursue an adoption) would have standing to petition for custody or visitation.

As Judge Read points out, our decision in *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199, 853 N.E.2d 610 (2006) applying equitable principles in the context of a paternity dispute was fully consistent

with *Alison D.* Beyond the fact that the Legislature has incorporated an equitable standard in the Family Court Act provisions governing paternity determinations (*see* Family Ct. Act § 418[a]; § 532[a]), Shondel J.-the biological mother in that case-did not object to a finding that Mark D. was the father of the child. To the contrary, Shondel J. initiated a proceeding expressly seeking to have Mark D. adjudicated the father for purposes of obtaining financial support. Thus, the constitutional right of a fit parent to determine with whom her child associates was not implicated in *Shondel J.*, nor were equitable principles relied on in that case to declare a person lacking biological or adoptive ties to a child to be a parent over the objection of the child's fit biological mother. Consistent with the relevant statute, and with the consent of the biological mother, equitable estoppel was merely used as a vehicle to preclude Mark D. from withdrawing his prior sworn and unsworn statements that he was the child's father and from relying on genetic marker or DNA tests to disprove paternity.

Shondel J. did not undermine *Alison D.* and the objective standard for determining parental status emanating from that case continues to serve the interests of both parents and children. *Alison D.'s* clear standard encourages a party who seeks to form a parental relationship with a child but lacks biological ties to pursue a legal adoption as soon as possible, without leaving a question as important as parental status undetermined perhaps for years, subject to the credibility battles that characterize equitable estoppel hearings held long after the relationships between the

parties have soured. By encouraging early adoptions, the *Alison D.* rule serves the best interests of New York's children as it is optimal to expeditiously establish legal parenthood, especially to protect a child against unforeseen events such as the death of a biological parent. And since the express written consent of the biological parent is a condition precedent to a second-parent adoption, the rule also guarantees that standing to seek visitation or custody will never hinge on an after-the-fact dispute as to whether the other party's relationship with the child was sufficiently close or had been fostered by the biological parent. Under *Alison D.*, when a romantic relationship ends, whether the parties were same-sex or heterosexual partners, a hearing to determine who is the child's legal parent is generally unnecessary as the parentage issue can readily be determined as a matter of law based on objective genetic proof or documentary evidence. Thus, protracted litigation on the standing of a party hoping to obtain custodial rights or visitation is avoided, which further promotes the settlement of these issues rather than the contentious litigation that is all too frequently harmful to children.

Judge Smith proposes a standard that addresses the parental status of certain same-sex partners that employ artificial insemination to conceive a child. He proposes that "where a child is conceived through ADI [artificial donor insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—

the child of both" (*see* Smith, J., concurring op. at 612, 904 N.Y.S.2d at 284, 930 N.E.2d at 205). Like the equitable estoppel test, this formulation invites litigation over whether the parties were "living together" (presumably, they must be living together in a romantic relationship, not merely as roommates) at the time of insemination, whether the insemination was "with the knowledge and consent" of the other partner, and whether "extraordinary circumstances" exist, whatever those might be. Under this set of factors, the same types of factual controversies that typify the equitable estoppel analysis would ensue.[1]

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1. Although *Matter of H.M. v. E.T.*, 14 N.Y.3d 521, 904 N.Y.S.2d 285, 930 N.E.2d 206 (2010) (decided today) does not involve an application for custody or visitation, the allegations in that case demonstrate some of the issues that arise in this context. There, 12 years after a same-sex relationship ended, the biological mother of a child born during the relationship through artificial insemination sought child support from her former same-sex partner and the same-sex partner denied that she was a parent of the child. The former partner alleged that, although she and the biological mother were living in the same household during the relevant period, this was not the product of a romantic relationship—she and her husband had hired the biological mother as a live—in nanny to their children and the mother had remained in the home in that capacity after the marriage ended. The former partner asserted that she had assisted the biological mother with the process of insemination because they were close friends; although they had been involved in a brief romantic relationship at that time, she denied that she had ever agreed to become a parent to the child. Obviously, under Judge Smith's approach, these disputes as to

(Cont'd)

I do not suggest that a specialized approach should not be developed for same-sex couples who conceive children through artificial insemination or other assisted reproduction technologies (ART), particularly as medical techniques continue to evolve. But the criteria for establishing parental rights should be objective to ensure certainty for the parties and consistency in application. For these reasons, I believe it is more appropriate for the Legislature to develop the standards and procedures under which parenthood will be determined for same-sex couples in the artificial insemination and ART context, just as it has done for married couples under Domestic Relations Law § 73 (providing that any child born to a married woman through artificial insemination is the child of her husband if he gave prior written consent to the procedure).

Indeed, some states have enacted statutes that specifically address the parental rights of same-sex partners who rely on artificial insemination or ART to conceive a child. For example, the New Mexico Legislature adopted a provision stating that "[a] person who provides eggs, sperm or embryos for or consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child" (N.M. Stat. Ann. § 40-11A-703). The statute contemplates that the "intended parent or parents shall consent to the assisted reproduction in a record signed by them before

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(Cont'd)

the parties' living and relationship status more than a decade ago, as well as whether they consented to parent the child together, would be the subject of a hearing.

the placement of the eggs, sperm or embryos" (N.M. Stat. Ann. § 40-11A-704 [A]). The New York Legislature could craft a provision addressing the parental status of same-sex partners in the artificial insemination or ART context either by incorporating an objective standard that promotes predictability for parents and children, or by pursuing a different approach. But, to date it has not done so, nor has it legislatively overruled *Alison D.* I therefore conclude that there is no basis for this Court to depart from the analysis applied in that case and emphasize that, at present, the surest way for same-sex couples to protect the interests of children born during their relationships is to promptly undertake second-parent adoptions that constitute conclusive proof of parental status.

Although parental status for visitation and custody depends on a biological or adoptive relationship under New York law, Judge Read aptly demonstrates why it is appropriate in this case to consider Vermont law. Here, unable to marry or enter into a civil union in New York, the parties chose to enter into a civil union in Vermont when Janice R. was eight months' pregnant. At that time, as is the case today, the Vermont civil union statute clearly stated that "[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage" (Vt. Stat. Ann., tit. 15, § 1204[f]). Under Vermont's statute, a child born by artificial insemination to one partner of a civil union becomes the child of the other partner, meaning that this nonbiological parent has automatic standing to seek

custody or visitation if there is a breakdown in the adult relationship (*see Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 912 A.2d 951 [2006], *cert. denied* 550 U.S. 918, 127 S.Ct. 2130, 167 L.Ed.2d 863 [2007]) The parties in this case are presumed to have understood the legal ramifications of their decision to enter into a civil union and one of those legal ramifications was that each partner would be a parent of any child born during the union.[2] A legal, parental relationship was therefore created between Debra H. and the child.

Of course, the doctrine of comity would be inapplicable if the parentage provision in Vermont's civil union statute was inconsistent with New York public policy. But, in this regard, our sister-state's law-like New York's—predicates parentage on objective evidence of a formal legal relationship—the civil union. Since Debra H.'s status as a parent under Vermont law does not turn on the application of amorphous equitable standards but depends on the fact that she and Janice R. entered into a civil union before the child was born, it does not run afoul of the policy underlying *Alison D.* as it does not undermine New York's interest in ensuring certainty for parents and children.

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2. Another child was born to Janice R. after the parties' relationship ended but during the course of the civil union (which apparently has not been dissolved). Having failed to promptly attempt to establish a relationship with the second child and petition for custody or visitation, I believe that Debra H. has likely forfeited any right she may have had to assert parental rights.

CIPARICK, J. (concurring).

Although I agree with the majority that principles of comity require the recognition of Debra H.'s parentage of M.R. because of the Vermont civil union between the parties, I write separately to set forth my view that *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 [1991] should be overruled as outmoded and unworkable.

In *Alison D.*, the dissent predicted that the impact of the decision would be felt "far beyond th[e] particular controversy" of that case, by a "wide spectrum of relationships," including "heterosexual stepparents, 'common-law' and nonheterosexual partners . . . and even participants in scientific reproduction procedures" (77 N.Y.2d at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting]). That prediction has been borne out. In countless cases across the state, the lower courts, constrained by the harsh rule of *Alison D.*, have been forced to either permanently sever strongly formed bonds between children and adults with whom they have parental relationships (*see e.g. Matter of Janis C. v. Christine T.*, 294 A.D.2d 496, 496-497, 742 N.Y.S.2d 381 [2d Dept.2002], *lv. denied* 99 N.Y.2d 504, 754 N.Y.S.2d 203, 784 N.E.2d 76 [2002]; *Gulbin v. Moss-Gulbin*, 45 A.D.3d 1230, 1231, 846 N.Y.S.2d 743 [3d Dept.2007]) or engage in deft legal maneuvering to explain away the apparent applicability of *Alison D.* (*see e.g. Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 283, 288-289, 676 N.Y.S.2d 677 [2d Dept.1998]; *Beth R. v. Donna M.*, 19 Misc.3d 724, 734, 853 N.Y.S.2d 501 [Sup.Ct., N.Y. County

2008]). Moreover, the decision in *Alison D.* has been both questioned by judges (*see e.g. Anonymous v. Anonymous,* 20 A.D.3d 333, 333-334, 797 N.Y.S.2d 754 [1st Dept.2005, Ellerin and Sweeny, JJ., concurring]) and roundly criticized by legal scholars (*see e.g.* Schepard, Law and Children, *Revisiting 'Alison D.': Child Visitation Rights for Domestic Partners,* N.Y.L.J., June 27, 2002, at 3, col. 1; Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law,* 10 N.Y.L. Sch. J. Hum. Rts. 513, 516-517, 522-532 [1993]).

To be sure, we are not in the practice of casting aside good legal precedent based merely on harsh results and scholarly criticism. *Alison D.,* however, has never been good legal precedent. Rather, the majority in that case took an unwarranted hard line stance, fixing biology above all else as the key to determining parentage and thereby foreclosing any examination of a child's best interests (*see* 77 N.Y.2d at 657-658, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting]). As the dissent explained, the majority in *Alison D.* rendered an opinion that fell "hardest on the children of [nontraditional] relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority[ ] retreat[ed] from the courts' proper role . . . [by] tightening . . . rules that should . . . , above all, retain the capacity to take the children's interests into account" (*id.* at 658, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Since *Alison D.,* our decisions and the decisions of many of the lower courts have properly focused on the

best interests of the children when determining questions of parentage, including the application of equitable estoppel to determine paternity and support obligations (*see e.g. Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 324, 820 N.Y.S.2d 199, 853 N.E.2d 610 [2006]). The majority here insists that it was appropriate to apply the doctrine of equitable estoppel in *Shondel J.* and consider the child's best interests, but to apply the doctrine here would be inappropriate. The majority sees no "inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought" (majority op. at 593, 904 N.Y.S.2d at 270, 930 N.E.2d at 191) because section 70 of the Domestic Relations Law makes no mention of equitable estoppel. The majority infers that economic considerations are present in paternity and child support proceedings but not custody and visitation proceedings (*see id.*). I disagree. Support obligations flow from parental rights; the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable. Moreover, while it is true that section 70 of the Domestic Relations Law makes no mention of equitable estoppel, it is also true that the statute does not specifically define the term "parent." Notably, as Judge Kaye observed in the *Alison D.* dissent, one thing the Legislature *did* include in the statute was its intention that the courts "shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness" (Domestic Relations Law § 70[a]; *see also Alison D.*, 77 N.Y.2d at 659, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Appendix A

Other state courts have developed better, more flexible, multi-factored approaches to determine whether a parental relationship exists, thus conferring upon a petitioner standing to seek custody or visitation. Rather than relying strictly on biology or an adoptive relationship, as *Alison D.* does, other tests focus on a functional examination of the relationship between the parties and the child. For example, the approach developed by the Wisconsin Supreme Court is, in my opinion, properly protective of both the best interests of the children and the rights of biological and adoptive parents. Under the Wisconsin test,

> "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in

nature" (*In re Custody of H.S.H.-K.*, 193 Wis.2d 649, 658-659, 533 N.W.2d 419, 421 [1995]).

In short, I believe that, in order to demonstrate the existence of a parental relationship sufficient to confer standing under Domestic Relations Law § 70, a petitioner unrelated to a child by biology or adoption must prove that (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and (2) the petitioner intended to and actually did assume the typical obligations and roles associated with parenting (*see* Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 Fam. L.Q. 23, 49 [2006]; Ettelbrick, *Who is a Parent?*, 10 N.Y.L. Sch. J. Hum. Rts. at 516-517; Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L.J. 597, 640 [2002]; *see also In re Custody of H.S.H.-K.*, 193 Wis.2d at 658, 533 N.W.2d at 421; *V.C. v. M.J.B.*, 163 N.J. 200, 225, 748 A.2d 539, 553 [2000] [discussing formation of parental relationship as relevant to determination of parentage]), as is alleged here.

Although the majority believes that a functional approach would "trap" single biological and adoptive parents "in a limbo of doubt" (majority op. at 595, 904 N.Y.S.2d at 272, 930 N.E.2d at 193), I strongly disagree. In a test such as Wisconsin's, for example, one element that must be proven is that the biological or adoptive

parent consented to the formation of a parental relationship between the petitioner and the child. If a biological or adoptive parent does not consent, he or she may elect to continue raising the child on his or her own, without interference, as is a parent's constitutional right (*see Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 [2000]).

The majority claims that adopting a functional approach would "sidestep [ ]" section 70 of the Domestic Relations Law and "preempt our Legislature" by "creat[ing] an additional category of parent" (majority op. at 597, 904 N.Y.S.2d at 273, 930 N.E.2d at 194). However, as noted above, section 70 of the Domestic Relations Law contains no definition of the term "parent." In my view, it was the majority in *Alison D.* that "sidestepped" section 70 by refusing to give appropriate weight to the clear legislative intent, expressed in the statute, to protect the "best interest[s]" and "welfare and happiness" of children.

Thus, taking into consideration the social changes that have occurred since *Alison D.* (*see Godfrey v. Spano*, 13 N.Y.3d 358, 380-381, 892 N.Y.S.2d 272, 920 N.E.2d 328 [2009, Ciparick, J., concurring]; *see also Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 [1995]) and recognizing that Supreme Court has inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a

parent and what will serve a child's best interests,* I would reverse on both grounds and hold that Debra H. has standing to proceed with a hearing on the merits of her petition.

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* I agree with Judge Smith's concurrence insofar as he suggests that the presumption of legitimacy could be used to ascertain whether the same-sex partner of a biological parent is also a parent to a child born during the course of the parties' relationship, but would extend the presumption to include biological children of same-sex male couples as well. I believe that such a presumption, however, would constitute only one facet of a functional approach such as the one I suggest.

SMITH, J. (concurring in *Debra H. v. Janice R.* and *Matter of H.M. v. E.T.*).

These two cases present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a "parent" under New York law. In *Debra H. v. Janice R.*, a visitation case, a majority of the Court reaffirms the holding in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) that New York parenthood requires a biological or adoptive relationship, though the majority also holds-correctly in my view—that we should recognize Debra H.'s parental status under the law of Vermont. In *Matter of H.M. v. E.T.*, 14 N.Y.3d 521, 904 N.Y.S.2d 285, 930 N.E.2d 206 (2010) [decided today], a child support case, the majority holds—again correctly in my view—that Family Court has jurisdiction of the case, and does not reach the *Alison D.* question, while the dissent suggests that *Alison D.* requires dismissal.

Though I concur with the result in both cases, and join the *H.M. v. E.T.* majority opinion in full, I would depart from *Alison D.*, both for visitation and child support purposes. I grant that there is much to be said for reaffirming *Alison D.*, but I conclude that there is even more to be said against it.

I begin by expressing wholehearted agreement with much of what the *Debra H.* majority opinion, and Judge Graffeo's concurring opinion, say. It is indeed highly desirable to have "a bright-line rule that promotes

certainty in the wake of domestic breakups," and to avoid litigation "over parentage as a prelude to further potential combat over custody and visitation" (majority op at 593, 594). There are few areas of the law where certainty is more important than in the rules governing who a child's parents are. For that reason, I join the *Debra H.* majority in rejecting the approach taken by the *Alison D.* dissent, which favored a multi-factor test for parenthood "that protects all relevant interests" (77 N.Y.2d at 662, 569 N.Y.S.2d 586, 572 N.E.2d 27), and by the Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K.*, 193 Wis.2d 649, 658-659, 533 N.W.2d 419, 421 (1995), which permitted a party to establish a "parent-like relationship" by proving four amorphous elements, including such things as "significant responsibility for the child's care, education and development" and "a bonded, dependent relationship" with the child. The *Debra H.* majority is quite right to see in these vague formulas a recipe for endless litigation, which would mean endless misery for children and adults alike.

These reasons lead the *Debra H.* majority and the *H.M. v. E.T.* dissent to follow *Alison D.* in concluding that women in the position of Debra H. (putting aside her civil union with Janice R.) and E.T. are not parents of their former lovers' children. But despite the high value I set on certainty and predictability, I find this result unacceptable. I would therefore adopt a different "bright-line rule"-one that includes these women and others similarly situated in the definition of "parent."

Appendix A

The position of Debra H. and E.T. is an increasingly common one. Each lived with her same-sex romantic partner. In each case, while the couple was living together, the partner was artificially inseminated with sperm from an unknown donor (artificial donor insemination, or ADI) and gave birth. Both women in each case expected, and led the other to expect, that both of them would be the child's parents. Yet the *Debra H.* majority holds that Debra H. would never have become a parent absent the civil union, while the *H.M. v. E.T.* dissent implies that E.T. never became a parent at all. This approach not only disappoints the expectations of the adults involved: much worse, it leaves each child with only one parent, rendering the child, in effect, illegitimate.

To put a large and growing number of our state's children in that status seems wrong to me. Each of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced. Nor can it be said that adoption by the nonbiological parent-an option available under *Matter of Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995)-is an adequate recourse, for adoption is possible only by the voluntary act of the adopting parent, with the consent of the biological one. To apply the rule of *Alison D.* to children situated as are the children in these cases is to permit either member of the couple to make the child illegitimate by her whim-as the facts of these two cases illustrate.

I have said that the interest in certainty is extremely strong in this area; but society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so. That policy underlies the common-law presumption of legitimacy, "one of the strongest and most persuasive known to the law" (*Matter of Findlay*, 253 N.Y. 1, 7, 170 N.E. 471 [1930, Cardozo, Ch. J.]; *see also Michael H. v. Gerald D.*, 491 U.S. 110, 125, 109 S.Ct. 2333, 105 L.Ed.2d 91 [1989] [the strength of the presumption derives from "an aversion to declaring children illegitimate . . . thereby depriving them of rights of inheritance and succession . . . and likely making them wards of the state"]). The policy has been adopted as a matter of statute in particular circumstances (Domestic Relations Law §§ 24, 73) and, in one persuasively reasoned Appellate Division case, has been adapted as a matter of common law to protect children born by ADI (*Laura WW. v. Peter WW.*, 51 A.D.3d 211, 856 N.Y.S.2d 258 [3d Dept.2008]). I would apply the common-law presumption to the facts of these cases, and would hold that where a child is conceived through ADI by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both.

The rule I propose is clearly defined in at least one respect: It would apply only to same-sex couples—indeed, only to lesbian couples, because I would leave for another day the question of what rules govern male couples, for whom ADI is not possible. This limitation may give some pause, for it seems intuitively that all

people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology. By the choice of our Legislature, a choice we have held constitutionally permissible (*Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1 [2006]), same-sex couples in New York have neither marriage nor domestic civil unions available to them. And, pending even more astounding technological developments than we have yet witnessed, it is not possible for both members of a same-sex couple to become biological parents of the same child. These differences seem to me to warrant different treatment. Indeed, different treatment already exists, for both a statute (Domestic Relations Law § 73) and the common law (*Laura WW.*, 51 A.D.3d at 217, 856 N.Y.S.2d 258) give a measure of protection to the children of married opposite-sex couples who are conceived by ADI. The rule I propose would give the children of lesbian couples similar, though not identical, protection.

In one respect, the rule I have suggested would come closer to treating gay and straight couples alike than the more flexible rules advocated or adopted in many writings, including the *Alison D.* dissent, the Wisconsin decision in *In re Custody of H.S.H.-K.*, and Judge Ciparick's concurrence today in *Debra H.* Under these approaches, the same-sex partners of biological parents would have an opportunity to become quasi-parents—"de facto parents," parents-by-estoppel, or persons "in a parent-like relationship." As to women in

the situation of Debra H. and E.T., I would drop all the hyphens and quotation marks, and call them simply parents.

For these reasons, I would hold that Debra H. is M.R.'s parent, and that E.T. is the parent of H.M.'s biological son. Therefore, in *Debra H. v. Janice R.*, I would not find it necessary to reach the effect of the Vermont civil union (although, since the majority does reach it, I join in its resolution of that question); and I would hold that Family Court has jurisdiction in *H.M. v. E.T.* not only on the narrow ground adopted by the majority, but also on the ground that E.T. is the child's parent and therefore "chargeable with the support of such child" within the meaning of Family Court Act § 413(1)(a).

Appendix A

Judges GRAFFEO, PIGOTT and JONES concur with Judge READ; Judge GRAFFEO concurs in a separate concurring opinion in which Judge JONES also concurs; Judge CIPARICK concurs in result in another opinion in which Chief Judge LIPPMAN concurs; Judge SMITH concurs in result in another opinion.

Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

APPENDIX B — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED APRIL 9, 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK

DEBRA H.,

Petitioner-Respondent,

v.

JANICE R.,

Respondent-Appellant.

National Association of Social Workers, The National Association of Social Workers' New York State Chapter, The National Association of Social Workers' New York City Chapter, The New York Civil Liberties Union and American Civil Liberties Union, Amici Curiae.

April 9, 2009.

GONZALEZ, P.J., TOM, SWEENY, CATTERSON, RENWICK, JJ.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered October 9, 2008, which granted a hearing on whether petitioner stands in loco parentis to respondent's biological child and whether respondent should be equitably estopped from denying that parental

relationship, and appointed a law guardian to represent the child's best interest, unanimously reversed, on the law, without costs, the order vacated, the petition denied and this proceeding dismissed.

Petitioner seeks joint legal and physical custody of respondent's biological child, born approximately one month after the parties entered into a civil union in the State of Vermont, and more than two months after they registered as domestic partners in New York City. Although the record indicates that petitioner served as a loving and caring parental figure during the first 2 1/2 years of the child's life, she never legally adopted the child.

This matter is governed by the Court of Appeals decision in *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 [1991], which provides that a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70, even though that party may have developed a longstanding, loving and nurturing relationship with the child and was involved in a prior relationship with the biological parent.

Supreme Court concluded that denial of petitioner's right to invoke equitable estoppel herein would be inconsistent with the application of that doctrine in similar proceedings (*see e.g. Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199, 853 N.E.2d 610 [2006]; *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282,

285, 676 N.Y.S.2d 677 [1998]). However, to the extent such inconsistencies exist, our reading of precedent is such that the doctrine of equitable estoppel may not be invoked where a party lacks standing to assert at least a right to visitation (*see Anonymous v. Anonymous*, 20 A.D.3d 333, 797 N.Y.S.2d 754 [2005]; *Matter of Multari v. Sorrell*, 287 A.D.2d 764, 731 N.Y.S.2d 238 [2001]).

Our conclusion that petitioner lacks standing renders academic respondent's claim that Supreme Court improvidently exercised its discretion by appointing a law guardian in this matter.

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY DATED OCTOBER 2, 2008

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

No. 106569/08.

Debra H.,

Petitioner,

v.

Janice R.,

Respondent.

October 2, 2008.

Decision & Order

Harold B. Beeler, J.S.C.

Petitioner moves by order to show cause for joint legal and physical custody of the subject child (hereinafter "M.R."), parenting time and telephone contact with M.R., appointment of an attorney for the child, and an immediate hearing regarding legal and physical custody of M.R. Respondent opposes the motion.

Appendix C

BACKGROUND

There are few facts in this matter which are undisputed. Respondent's a sole practicing attorney in Manhattan. Petitioner is a managing consultant who also owns her own firm. The parties met in January 2002 and became intimate shortly thereafter. Prior to meeting petitioner, respondent had attempted to become pregnant through artificial insemination, but was unable to carry to term. In the Spring of 2003, respondent successfully conceived M.R. through artificial insemination. Shortly thereafter, respondent moved into petitioner's apartment on West 90th Street while maintaining her separate residence on West 89th Street. The dining room in petitioner's apartment was converted into M.R.'s bedroom. Petitioner's daughter from a previous marriage stayed in the second bedroom of the apartment when she visited from college, and then later, from law school. On September 25, 2003 the parties registered as domestic partners with the City of New York and on November 12, 2003 entered into a civil union in Vermont (petitioner's exhibits A, B).

Respondent gave birth to M.R. on December 8,2003. Petitioner was present in the delivery room and cut the baby's umbilical cord. M.R. was given petitioner's last name as a middle name.[1] The child naming certificate

1. After the parties separated, respondent commenced an action in the Civil Court of New York City, Kings County, to have petitioner's last name removed as M.R.'s middle name. In July 2006, Kings County Civil Court issued an order legally (Cont'd)

issued by the parties' synagogue and the synagogue's newsletter announcing M.R.'s birth lists both parties as M.R.'s parents (petitioner's exhibit K).

Prior to M.R.'s birth, the parties met with an adoption attorney for the purpose of investigating a second-parent adoption. The attorney advised the parties that petitioner could not seek a second-parent adoption until M.R. was at least 6 months old. Although the parties have different explanations as to why, it is undisputed that petitioner never adopted M.R. Respondent did, however, execute a Power of Attorney, on February 20, 2006, appointing petitioner as M.R.'s guardian, until he turned 21 years old (petitioner's exhibit V).

In February 2006 respondent moved out of petitioner's apartment with M.R., and back into her own apartment on West 89th Street. Although the parties attempted to work on their relationship after respondent moved out, by March 2006 respondent had terminated the relationship.

Even after the parties were broken-up, petitioner continued to see and talk to M.R. on a daily basis from February 2006 through May 2006. In or around May 2006, respondent limited petitioner's time with

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(Cont'd)
removing petitioner's last name from M.R.'s middle name. M.R.'s passport, issued a year earlier on July 5, 2005, did not include petitioner's last name as the child's middle name (respondent's exhibit C).

M.R. to a few hours every Sunday, Wednesday and Friday. Petitioner continued to have daily telephone contact with M.R. during this time. It is not clear to this court exactly why, but after the parties had been separated for approximately one month, respondent insisted that M.R.'s nanny, and later respondent herself, be present during all of petitioner's time with M.R. Beginning on or around March 14, 2008, respondent began to cut back on petitioner's access with M.R. On or around April 28, 2008, respondent terminated all of petitioner's physical visits with M.R.; shortly thereafter, on or around May 3, 2008, respondent terminated all of petitioner's telephone contact with M.R. as well.

On or around May 12, 2008, petitioner brought this instant order to show cause, seeking, *inter alia*, joint legal and physical custody and parenting time with M.R. A hearing on the Temporary Restraining Order was held on May 21, 2008, and after oral arguments, the court signed the order to show cause and granted petitioner interim access to M.R. on a basis consistent with the schedule in place before respondent began cutting back on petitioner's access, pending a full hearing on the motion. After oral arguments on the return date of the motion, July 10, 2008, the court issued a further order continuing petitioner's access with M.R. until a decision was made on the motion.

Although the parties agree to the facts as stated above, their affidavits and the affidavits of various third-parties in support of their respective positions, differ

substantially with respect to the nature and extent of petitioner's relationship with respondent and, more significantly, with M.R.

According to petitioner, in or around June 2002, the parties were committed to one another and decided they wanted to have a family together. They agreed that respondent would be artificially inseminated and petitioner would adopt the child. Petitioner claims to have attended all doctor appointments with respondent, and to have reviewed and selected a sperm donor with respondent. Once respondent was pregnant, petitioner states that they saw a lactation and Lamaze specialist together, interviewed baby nurses and nannies together and selected a pediatrician together. According to petitioner, the parties registered as domestic partners and entered into a civil union before respondent gave birth so that their son would be born to parents who were committed to one another.

As previously stated, petitioner was present in the delivery room when M.R. was born and cut his umbilical cord. Petitioner claims that M.R.'s first name honors both of the parties' fathers, and that his Hebrew name honors petitioner's brother.

According to petitioner, after having been advised by an adoption attorney prior to M.R.'s birth that the parties would have to wait until M.R. was at least six-months-old before petitioner could adopt him, petitioner again raised the subject of adopting M.R. with respondent some time in the summer of 2004. Petitioner

claims that respondent dissuaded her from pursuing the adoption by telling her words to the effect of "we don't need an adoption. You are his parent. I am a lawyer. I know the court system. We don't want the Courts to get involved" (affidavit of petitioner dated May 12, 2008 at 12). According to petitioner, respondent also reassured her that she would never take M.R. away from her. Petitioner believed and trusted respondent, and therefore did not pursue the adoption any further.

Petitioner considers herself to be M.R.'s parent and states that she was held out as such. According to petitioner, the parties had birth announcements made for M.R. naming both parties as parents and sent them out to family and friends (petitioner's exhibit E). Both parties were also listed as M.R.'s parents on the child naming certificate issued by their synagogue and in the synagogue's newsletter announcing M.R.'s birth (petitioner's exhibit K). Although when speaking, M.R. would generally refer to respondent as "mommy" and to petitioner by her first name, he would also, according to petitioner, sometimes call petitioner "mama." According to petitioner, respondent addressed petitioner in cards as her "wife", or M.R.'s "mommy" or "mom" (petitioner's exhibit XX).

Petitioner further alleges that the parties would introduce each other and were introduced by others as M.R.'s parents, and she annexes cards from friends in which the parties are collectively referred to as M.R.'s "mommies" (petitioner's exhibit H).

Appendix C

Petitioner also claims to have contributed substantially to M.R.'s financial support during the time the parties lived together. According to petitioner, she and respondent shared the cost of converting her dining room into M.R.'s bedroom and child proofing the apartment. She also paid for the rabbi who performed M.R.'s bris, which was held in the petitioner's apartment (petitioner's exhibit J). In January of 2004, petitioner deposited $2,500 into an account that the parties opened for M.R.'s benefit (petitioner's exhibit J). She also claims to have paid for M.R.'s recreational expenses, travel, membership expenses, classes, clothing, shoes, toys, and books. With the exception of M.R.'s health insurance premiums, baby nurses and nanny, petitioner states that it was the parties' practice to share M.R.'s expenses.

From the time he was born until he was two years old, petitioner alleges to have performed all of the typical parenting responsibilities for a young child on behalf of M.R.: including, feeding him, changing him, dressing him, reading to him, and playing with him. Petitioner claims to have arranged various activities, classes and play dates for M.R. From his birth until last year, petitioner states that she and respondent continued to take M.R. to synagogue, doctor appointments, haircuts, and holiday and birthday celebrations together. When he was old enough, the parties toured pre-schools together, went to interviews together, and were both listed on applications and school and camp contact lists as M R.'s parents (petitioner's exhibits JJ and JJJ). Petitioner alleges that she and M.R. shared a very close

relationship. She further claims that respondent was jealous of the bond she shared with M.R. and that her jealously ultimately led to the couple's break-up.

Respondent recounts a very different set of facts. According to respondent, she never intended to have a family with petitioner and in support, cites to the fact that she was attempting to become pregnant by artificial insemination before she even met petitioner. Respondent claims that petitioner had no input in her decision to have a child and in the issues surrounding that decision, including the selection of a sperm donor.

Respondent states that petitioner was never her "spouse." She claims to have entered into the civil union in November 2003, because petitioner insisted upon it and coerced her into it when she was eight months pregnant. Respondent acquiesced to petitioner's demands because, after consultation with an attorney, she was advised that the civil union would be of no legal significance in the State of New York and she wanted petitioner to stop nagging her. According to respondent, the ceremony in Vermont was of no personal or emotional significance to her either. Respondent points out that if she had wanted, the parties could have easily been married in Canada, where same sex marriages were legal at the time, since petitioner was working there two-three days per week throughout 2004. Respondent states that she did not marry petitioner, however, out of concern that marriage might lead to a situation where petitioner might later seek visitation with M.R. if the relationship were to end.

Appendix C

Respondent acknowledges seeing an adoption attorney with petitioner prior to M.R.'s birth, but says she did so in order to avoid further confrontation after petitioner insisted upon it. When petitioner again raised the subject of adoption with respondent after M.R.'s birth, respondent refused and states that petitioner eventually dropped the subject.

Respondent alleges petitioner pressured her, 18 hours after giving birth, into making petitioner's last name M.R.'s middle name. Respondent says she reluctantly agreed to include the name on M.R.'s birth certificate, even though she had no intention of using it. M.R.'s passport issued on July 5, 2005 does not include petitioner's last name as his middle name (respondent's exhibit C). And in July 2006 respondent had petitioner's last name legally removed as M.R.'s middle name (respondent's exhibit D). Respondent further claims that it is only by coincidence that M.R.'s first name starts with the same letter as petitioner's father's, as M.R. was named solely in honor of respondent's father, not petitioner's. Moreover, respondent alleges that petitioner tricked her into giving M.R. petitioner's brother's Hebrew name by using her superior knowledge of the language to mislead respondent into believing that the name translated into something different.

Respondent argues that although petitioner may have held herself out as M.R.'s mother, she never did the same. According to respondent, she tolerated petitioner's attempts to create the appearance of a

family in reliance on the Court of Appeal's decision in *Matter of Alison D v. Virginia AL*, 77 NY2d 651 (1991), which, as an attorney, she had researched and determined precluded petitioner from claiming any rights as M.R.'s parent. Respondent claims that petitioner sent out birth announcements with both parties' names on them to her family and friends without respondent's permission. She also claims that without consulting her, petitioner listed herself as one of M.R.'s mothers on the child naming paperwork required by the synagogue, and therefore, both parties were listed as M.R.'s parents on the child naming certificate and in the synagogue's newsletter announcing M.R.'s birth. Likewise, respondent claims that petitioner, again without respondent's knowledge or consent, sent in an additional camp application for the summer of 2007 on behalf of M.R., and therefore, both parties were included on the camp's parent list for last summer. Respondent notified the camp not to send any documents related to M.R. to petitioner and, accordingly, petitioner was not listed on the camp's parent list for this past summer. Respondent, however, does acknowledge that petitioner was listed on one of M.R.'s school applications as a "guardian just in case" since the parties were still together when M.R. enrolled (affidavit of respondent dated June 20, 2008 at 16). After the parties separated, respondent again notified the school not to disclose any information regarding M.R. to petitioner (respondent's exhibit N).

Respondent claims that neither she nor M.R. referred to the petitioner as "mommy" or any derivation

thereof; rather, petitioner was always referred to by her first name or as "mommy's friend." Respondent states that only petitioner's friends sent petitioner cards in which she was addressed as "mommy." Respondent received congratulatory cards following M.R.'s birth addressed only to her (petitioner's exhibit B).

Respondent states that she has been M.R.'s sole financial support throughout his life. According to respondent, she paid approximately $50,000 out-of-pocket for intro-vitro-fertilization treatments and medications. She, with the help of her mother, also furnished M.R.'s bedroom and hired a professional to "child-proof" the apartment, at their sole cost. Respondent also alleges to have paid for more than 50% of petitioner's living expenses while the parties were residing together. She also paid for M.R.'s memberships to various parks and museums, his educational expenses, health insurance, baby nurse, nanny, vacations, clothes and toys, with the exception of a few toys that petitioner gave to him. Although petitioner initially paid for the cost of M.R.'s bris, respondent claims to have reimbursed her.

According to respondent, while petitioner may have helped out occasionally, respondent has always been M.R.'s primary caretaker. Either respondent, the baby nurses, or the nanny she hired would feed, bathe and read to M.R., not petitioner. Respondent hired and paid for all of the people who helped her care for M.R., without any input from petitioner. According to respondent, since petitioner traveled to Canada

two-three times per week for work during the first year of M.R.'s life, it would have been impossible for her to have cared for M.R. in the manner in which she alleges. Respondent claims that she alone has made all decisions regarding M.R.'s education, health, and extra-curricular activities. She argues that she arranged for and attended all of M.R.'s doctor appointments and selected and attended all of M.R.'s classes with him.

Respondent denies that petitioner is as important to M.R. as she claims and that she ever resented petitioner's relationship with M.R. According to respondent, after the parties separated she initially allowed petitioner to see and talk to M.R. out of guilt. However, after approximately one month, respondent required that either M.R.'s nanny and then later, respondent herself, be present with petitioner whenever she was with M.R. Respondent states that she has been trying to terminate petitioner's visits with M.R. since March of 2006, but because petitioner would "throw a fit" every time she attempted to do so, respondent acquiesced to allowing her to continue to see her son (affidavit of respondent dated June 20, 2008 at 22). However, after *Beth R v Donna AM*, 853 NYS2d 501 (Sup Ct, NY County 2008), was decided, a decision widely known throughout the lesbian community, petitioner's demands on respondent and M.R. became increasingly aggressive. In response, respondent gradually began to cut back on petitioner's time with M.R. beginning on or around March 14, 2008. When petitioner threatened to hire an attorney and bring an action against

respondent if she did not allow her to continue to see M.R., respondent cut off all contact between petitioner and M.R.

According to respondent, M.R. did not ask for petitioner or react in anyway after respondent cut-off petitioner's contact with him. She states that he is a happy and well-adjusted boy, and, according to his teachers, was much more out-going and friendly during the month following the termination of his contact with petitioner. Respondent alleges that if M.R. was in anyway suffering as a result of not seeing petitioner, she would not have opposed this motion. Respondent believes that petitioner brought this action, not out of concern for M.R.'s welfare, but as a means of attempting to control her and her son's life.

LEGAL ANALYSIS

Petitioner seeks to have this court grant her joint legal and physical custody of M.R., with parenting time and telephone contact. She moves for the appointment of an attorney for the child to represent the best interests of M.R. Respondent opposes the application on the grounds that petitioner lacks standing to seek custody or visitation with M.R. since she is neither his biological nor adoptive parent. *Matter of Alison D. v Virginia M.*, 77 NY2d 651 (1991); *Anonymous v. Anonymous*, 20 AD3d 333 (1st Dept 2005); *Gublin v. Moss-Gublin*, 45 AD3d 1230 (3d Dept 2007). The petitioner contends that the respondent is estopped from challenging her parental status *vis á vis* M.R. since

petitioner, with the respondent's encouragement, has established strong parental ties to M.R. *In the Matter of Shondel v. Mark D.*, 820 NYS2d 199 (2006); *Beth R..v. Donna M.*, 853 NYS2d 501 (Sup Ct, NY County 2008).

The statute applicable to this matter, DRL §70, states that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and, on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require . . . In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will promote its welfare and happiness, and make award accordingly."

In the *Matter of Alison D. v. Virginia M.*, 77 NY2d 651 (1991), the case allegedly relied upon by respondent in fashioning her dealings with petitioner, the Court of Appeals held that a person who is not a biological or adoptive parent of a child is not a "parent" within the meaning of DRL §70, and therefore lacks standing to seek visitation. *In Alison D,* the petitioner sought to have visitation with a child born to her former same-sex partner, with whom she shared joint parenting responsibilities during the first two and a half years of the child's life, on the grounds that she was the child's "de facto" parent or parent "by estoppel." *Id* at 656. Applying a narrow reading of the term "parent" under the DRL, the court held that the petitioner "has no right

under Domestic Relations Law §70 to seek visitation and, thereby, limit or diminish the right of the concededly fit biological parent to choose with whom her child associates." *Id.*

The court rendered its decision *in Alison D.* over the strong dissent of now Chief Judge Judith Kaye who opined that in taking such a "hard line" in defining "parent" under DRL §70, the majority had ignored the legislative purpose of the statute, which was to promote " 'the best interest of the child' and the child's 'welfare and happiness.' " *Id* at 659 *quoting* DRL §70. Chief Judge Kaye would have remanded the case to the trial court for a determination as to whether the petitioner stood in *loco parentis* to the child and, if so, whether it was in the child's best interest to allow the petitioner visitation rights. *Id.*

Since *Alison D.* was decided over seventeen years ago, some courts, while following the majority's holding *in Alison D.*, have expressed a reluctance in doing so or a willingness to recognize an equitable estoppel argument in custody or visitation disputes under different circumstances. *See Multari, Jr. v Sorrell*, 287 AD3d 764, 767 (3d Dept 2001) (noting that while the court may be inclined to agree with the concurring opinion that an estoppel argument may be recognized under certain circumstances, it felt bound to adhere to *Alison D.); Bank v. White*, 40 AD3d 790, 791 (2d Dept 2007) ("Although equitable estoppel has been applied by this Court to visitation disputes under compelling circumstances, we decline to apply it under the facts of

this case.") (citations omitted); *Gublin v. Moss-Gublin*, 45 AD3d 1230, 1231(3d Dept 2007) ("*Here*, the doctrine [of equitable estoppel] is inapplicable . . . *Under these circumstances*, it cannot be concluded that defendant led plaintiff to form a reasonable belief that her claim to custody of her second son would not be asserted.") (emphasis added); *Anonymous v. Anonymous*, 20 AD3d 333, 333 (1st Dept 2005) ("Although the doctrine of equitable estoppel has been applied in various proceedings involving paternity, custody and visitation, there is no basis for its invocation here.").

Other courts have entirely rejected the majority's reasoning *in Alison D.* and, instead, have relied on Chief Judge Kaye's dissent, applying equitable estoppel based on the best interests of the child in custody or visitation disputes. *See Jean Maby H. v Jospeh H*, 676 NYS2d 677 (2d Dept 1998); *Gilbert A. v. Laura A.*, 261 AD2d 886 (4th Dept 1997) (husband entitled to present proof as to whether the doctrine of equitable-estoppel applies with respect to his application for visitation with a child born during the marriage, but who was not his biological or adoptive child); *Beth R. v. Donna M.*, 853 NYS2d 501 (Sup Ct, NY County, 2008); *Christopher S. v. Ann Marie S.*, 173 Misc.2d 824, 832 (Sup Ct, Dutchess County 1997) (based on the best interest of the child, the biological mother was equitably estopped from raising her ex-husband's status as a non-biological parent as an issue in a custody proceeding).

In *Beth R.*, the case most heavily relied upon by petitioner, the plaintiff commenced a divorce action

against her same-sex spouse and sought a determination of her custodial rights and support obligations *vis á vis* the children born immediately before and during the marriage. 853 NYS2d 501. The parties in that case had been dating for approximately two years before the defendant became pregnant by artificial insemination. The parties had intended to marry in Canada prior to the birth of the child, but because of a death in the defendant's family, the wedding was postponed until approximately four months after the child was born.[2] The defendant had another child by artificial insemination approximately two years later. The plaintiff was present in the delivery room during the birth of both children and cut their umbilical cords. Although the defendant never allowed the plaintiff to adopt the children, both children were given the plaintiff's last name, the parties sent out birth announcements together, were on the same insurance plan, and the defendant named the plaintiff as the children's guardian in her will. The children referred to the defendant as "Mom" and the plaintiff as "Mommy." Each party cared for, supported and made important decisions regarding the children's upbringing.

In granting the plaintiff standing to seek custody, the court in *Beth R.* relied on a line of case law that has emerged, parallel to *Alison D.* and its progeny, in which equitable estoppel has been used as a defense where a person, typically a non-biological father, seeks to avoid

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2. The parties had, however, obtained a marriage license in Canada before the birth of the first child.

child support obligations, or a biological father belatedly seeks recognition of his parental rights. *Beth R.*, 853 NYS2d at 507 (*citing Matter of Diane E. v. Angel M.*, *20* AD3d 370 (1st Dept 2005); *Hammack v. Hammack*, 291 AD2d 718 (3d Dept 2002); *Fung v. Fung*, 238 AD2d 375 (2d Dept 1997); *Purificati v. Parcos*, 154 AD2d 360 (2d Dept 1989)). In particular, the court relied on the recent Court of Appeals decision in *Matter of Schondel J v. Mark D.*, 7 NY3d 320 (2006) and the latter's reference to Maby *H. v. Joseph H.*, 246 AD2d 282 (2d Dept 1998).

In *Schondel J.* the court held that the best interests of the child warranted equitably estopping the child's non-biological father from denying paternity and from refusing to pay child support, since he had held himself out as the child's father and the child had justifiably relied on his representation of paternity. 7 NY3d at 328. The court in *Schondel J.* observed that "[t]he potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether *emotional* or financial, may leave the child in a worse position than if that support had never been given." *Id.* at 330 (emphasis added).

Although *Schondel J.* involved issues of paternity and child support, the court, nevertheless, cited to *Maby H. v. Joseph H,* 246 AD2d 282 (2d Dept 1998), a custody and visitation proceeding, for the proposition that "New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our

reason has been and continues to be the best interest of the child." *Schondel J,* 7 NY3d at 328 (*citing Maby H,,* 246 AD2d at 285). In Maby *H,* the court found that although the husband was not the biological or adoptive father of a child born to the wife prior to the marriage, the wife, nevertheless, was equitably estopped from contesting his standing to seek custody or visitation since, among other things, he was named the father on the child's birth certificate, he was held out as the father for the first five years of the child's life and he financially supported the child. *Maby H.,* 246 AD2d 282. In conclusion, the court in *Maby H.* stated "we are of the opinion that the best interests of the child will not be served in this case if... *Alison D.* (supra) [is] blindly applied." *Id* at 289.

The court in *Beth R* found the Court of Appeals' reference in *Shondel J.,* a paternity and child support proceeding, to *Maby H.,* a custody and visitation proceeding, to be of significance and "not mere coincidence" in light of the "many cases that have authorized equitable estoppel as a defense to paternity proceedings" which the *Shondel J.* court could have cited to instead *of Maby H.* 853 NYS2d at 508. The court in *Beth R.* went on to state, "[i]f the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate." *Id.* In reliance on *Shondel J.* and *Maby H.,* the court concluded that the facts before it justified a hearing to determine whether the best interests of the children warranted granting custodial rights to the plaintiff. *Id.* at 508-509.

Appendix C

An additional factor in support of the court's holding in *Beth R.* was that the parties were married. 853 NYS2d at 509. The court reasoned that the marriage in and of itself created obligations between the parties that could affect the children's welfare and also demonstrated the parties' intention to create familial bonds, particularly for the benefit of their children. *Id.* The court further pointed out that the birth of the second child during the marriage may require a finding that that child is the legitimate child of both parents. *Id. (citing* DRL § 73; *H v. P,* 90 AD2d 434 (1st Dept 1982); *Laura G. v. Peter G.,* 15 Misc.3d 164 (Sup Ct, Delaware County 2007)).

This court shares the concern expressed by Chief Judge Kaye in *Alison D., 77* NY2d 651, and which was adopted in later cases, such as *Maby H.,* 246 AD2d 282, *Shondel J.,* 820 NYS2d 199, and most recently, *Beth R.,* 853 NYS2d 501, that a formulaic approach to defining the word "parent" under the DRL may not always effectuate the legislature's express intent of furthering the best interests of the child. This court agrees that it is inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking the doctrine against the biological parent in order to maintain an established relationship with the child. *Maby H.,* 246 AD2d at 287 (*citing Matter of Christopher S. v. Ann Marie S.,* 173 Misc.2d 824 (Fam Ct, Duch County 1997). In either scenario, the court's primary concern should be furthering the best interests of the child.

Appendix C

The facts as alleged by petitioner, if found to be true, establish a prima facie basis for invoking the doctrine of equitable estoppel. *Maby H.*, 246 AD2d at 289. Of particular significance are her allegations that the parties moved in together and consulted an adoption attorney prior to M.R's birth, sent out birth announcements together, were both listed as M.R.'s parents on the child-naming certificate and on some of M.R.'s school and camp documents, and that petitioner was present in the delivery room at M.R.'s birth and cut his umbilical cord, and that M.R. was given petitioner's last name as a middle name on his original birth certificate.

Moreover, the parties' civil union at the time of M.R.'s birth, is a significant, though not necessarily a determinative, factor in petitioner's estoppel argument. While respondent attempts to minimize the significance of the ceremony, parties to a civil union are given the same benefits, protections and responsibilities under Vermont law as are granted to those in a marriage. 15 VSA §1204(a), (d). This includes the assumption that the birth of a child during a couple's legal union is "extremely persuasive evidence of joint parentage." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Sup Ct, VT 2006) (holding that the non-biologically-related partner is the parent of a child born by artificial insemination to the other partner of a civil union). Like the marriage in *Beth R.*, the civil union here is strong evidence of the parties'

intention to create familial bonds for their and M.R.'s benefit. *Beth R.*, 853 NYS2d 501.[3]

However, since respondent disputes many of the facts alleged by petitioner regarding the nature and extent of their relationship and petitioner's relationship with M.R., a hearing is required in order to resolve whether petitioner stands in *loco parentis* to the child and may, therefore, invoke the doctrine of equitable estoppel against respondent. *See Matter of Alison D. v. Virginia M.*, 77 NY2d 652,662 (1991, Kaye, J., dissenting); *H.M. v. E. T.*, 851 NYS2d 58 (Fam Ct, Rockland County 2007) (ordering a hearing to determine whether a party is equitable estopped from denying responsibility to pay child support on behalf of her former same-sex partner's biological child).

The So-Ordered Stipulation regarding access dated July 10, 2008 shall remain in effect, pending a final decision on the issue of standing. Accordingly, all visits shall continue to take place in the petitioner's home with a mutually agreed upon third-party present. If it is determined that the petitioner stands in *loco parentis* to the child, a hearing will then be held to determine whether it is in the child's best interest to allow petitioner custodial and visitation rights.

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3. Notably, in no other custody and/or visitation case following the majority's holding in *Alison D.*, were the parties in a civil union at the time of the birth of the subject child(ren). In that regard, this case is one of first impression.

Appendix C

That branch of the motion seeking appointment of an attorney for the child is granted. The parties' attorneys shall attempt to agree on an attorney for the child and shall submit the name to the court for its approval within seven days from the date of this decision. If the attorneys are unable to agree, they shall each anonymously submit the names of three attorneys for the child to the court within eight days from the date of this decision, and the court shall consider their recommendations in its appointment. The cost of the attorney for the child shall be shared equally by the parties.

A status conference is scheduled for October 27, 2008 at 2:00 P.M. at Part 9, 71 Thomas Street, Room 304.

This constitutes the decision and order of the court.

DATE: October 2, 2008

ENTER:

HAROLD B. BEELER, J.S.C.

APPENDIX D — ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING MOTION FOR REARGUMENT DATED JULY 1, 2010

COURT OF APPEALS OF NEW YORK

No. 2010-691.

DEBRA H.,

Appellant,

v.

JANICE R.,

Respondent.

July 1, 2010.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.